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<p style="text-align: right;">Page 97</p> <p>1 in the United States?</p> <p>2 A. Yes.</p> <p>3 MR. KAO: Objection to form.</p> <p>4 MR. HEISE: Q. Do you know whether the</p> <p>5 software product was used outside the United States by</p> <p>6 Sequent at any time?</p> <p>7 MR. KAO: Objection to form.</p> <p>8 THE WITNESS: I assume you're referring to the</p> <p>9 period of time that this agreement alone was in force?</p> <p>10 MR. HEISE: Q. No. I need to ask you what</p> <p>11 you mean by "this agreement alone was in force."</p> <p>12 A. After the distribution rights agreement was</p> <p>13 signed, then certain elements, as part of the binary</p> <p>14 distribution, might have been distributed outside of the</p> <p>15 United States.</p> <p>16 Q. Okay. And I appreciate you making that</p> <p>17 clarification, because I'm talking strictly source code,</p> <p>18 not binary code.</p> <p>19 A. Okay.</p> <p>20 Q. So my question to you is: Do you know whether</p> <p>21 Sequent at any time distributed source code covered by</p> <p>22 this software agreement outside the United States?</p> <p>23 A. Not to my knowledge.</p> <p>24 MR. KAO: Objection to form.</p> <p>25 MR. HEISE: Q. Did Sequent have any</p>	<p style="text-align: right;">Page 99</p> <p>1 working on Dynix with access to Unix System V in India?</p> <p>2 MR. KAO: Objection to form.</p> <p>3 THE WITNESS: Not to my knowledge.</p> <p>4 MR. HEISE: Q. Did Sequent, in fact, have</p> <p>5 engineers in India?</p> <p>6 MR. KAO: Objection to form.</p> <p>7 THE WITNESS: During my tenure at Sequent, no.</p> <p>8 I'm aware that Sequent made outsourcing arrangements</p> <p>9 with Indian firms later, although I don't think that</p> <p>10 those were related to System V.</p> <p>11 MR. HEISE: Q. What do you think they were</p> <p>12 related to?</p> <p>13 A. I think they were related to other product</p> <p>14 support issues.</p> <p>15 Q. Were they related to Dynix?</p> <p>16 A. They may have been related to Dynix, yes.</p> <p>17 Q. In Section 2.01, is there anything that you</p> <p>18 thought was unclear or ambiguous at the time that you</p> <p>19 signed it or as you sit here today, after having</p> <p>20 reviewed it on various occasions both by yourself and</p> <p>21 with IBM's counsel?</p> <p>22 MR. KAO: Objection to form.</p> <p>23 THE WITNESS: There's nothing particularly</p> <p>24 unclear. I mean, it has the same vagueness that we</p> <p>25 discussed earlier.</p>
<p style="text-align: right;">Page 98</p> <p>1 facilities outside of the United States?</p> <p>2 A. It did.</p> <p>3 Q. Where?</p> <p>4 A. It had sales offices in the U.K., outside of</p> <p>5 London. It had sales offices in Hong Kong. It had</p> <p>6 sales offices in France and Paris. It had sales offices</p> <p>7 in Japan, outside of Tokyo.</p> <p>8 Q. Did Sequent have engineers working anywhere</p> <p>9 outside the United States?</p> <p>10 A. Yes.</p> <p>11 Q. Did it have engineers working on Dynix outside</p> <p>12 the United States?</p> <p>13 A. Do you mean in the creation of Dynix or in the</p> <p>14 support or —</p> <p>15 Q. At any time after the System V code was</p> <p>16 licensed from AT&amp;T.</p> <p>17 MR. KAO: Objection to form.</p> <p>18 THE WITNESS: Of course. I mean, part of the</p> <p>19 sales process and technical sales is to have an engineer</p> <p>20 tell the customer when the sales guy's lying.</p> <p>21 MR. HEISE: Q. Do you know whether Unix</p> <p>22 System V was used by Sequent in India, for example?</p> <p>23 A. Not to my knowledge.</p> <p>24 MR. KAO: Objection to form.</p> <p>25 MR. HEISE: Q. Did Sequent have engineers</p>	<p style="text-align: right;">Page 100</p> <p>1 MR. HEISE: Q. The next sentence in</p> <p>2 Section 2.01 says:</p> <p>3 "Such right to use includes the right to</p> <p>4 modify such SOFTWARE PRODUCT and to prepare</p> <p>5 derivative works based on such SOFTWARE</p> <p>6 PRODUCT, provided the resulting materials are</p> <p>7 treated hereunder as part of the original</p> <p>8 SOFTWARE PRODUCT."</p> <p>9 Do you see where I'm reading from?</p> <p>10 A. I do.</p> <p>11 Q. Did you understand that to be identifying what</p> <p>12 Sequent could or could not do with the Unix System V</p> <p>13 code that it had licensed?</p> <p>14 MR. KAO: Objection to form.</p> <p>15 THE WITNESS: I understood it to mean that</p> <p>16 Sequent was required to maintain the confidentiality of</p> <p>17 the System V materials that might have been embodied in</p> <p>18 the derivative work.</p> <p>19 MR. HEISE: Q. What did you understand the</p> <p>20 phrase "the resulting materials" to be referring to in</p> <p>21 that sentence?</p> <p>22 A. In this paragraph, "the resulting materials"</p> <p>23 would apply to the source code, the object code that was</p> <p>24 derived from that source code, and the documentation</p> <p>25 that would describe the behavior of that object code.</p>

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1 Q. Did you understand that the resulting  
2 materials referred to the modifications and derivative  
3 works based on the software products?  
4 A. I don't understand your question.  
5 Q. In this sentence where it says,  
6 "... provided the resulting materials are treated  
7 hereunder as part of the original SOFTWARE PRODUCT," did  
8 you understand, sir, that the phrase "the resulting  
9 materials" was referring to the modifications and  
10 derivative works based on the software product?  
11 A. No, I did not.  
12 Q. What did you believe it was referring to?  
13 A. To the original System V source code and  
14 object code.  
15 Q. Well, if that's the case then, sir, why  
16 wouldn't there just be a period after "software product"  
17 and you would eliminate the entire second half of that  
18 sentence?  
19 MR. KAO: Objection to form.  
20 THE WITNESS: I don't know.  
21 MR. HEISE: Q. Isn't that what you are now  
22 telling us you understood the sentence to mean, that the  
23 second half of that sentence didn't mean anything  
24 differently than the first half?  
25 MR. KAO: Objection to form.

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1 THE WITNESS: No. My comprehension of this  
2 paragraph is that there's an unmodified software product  
3 and a modified software product that incorporates other  
4 things created by Sequent and that with regard to the  
5 unmodified portion, the same treatment applies.  
6 MR. HEISE: Q. Well, when you would give a  
7 customer a copy of Dynix code --  
8 A. Yes.  
9 Q. Source code, not object code.  
10 A. That didn't occur frequently.  
11 Q. But you did make provision for that? There  
12 were licenses for customers to get source code, was  
13 there not?  
14 A. There was at least one that I know of.  
15 Q. When a customer would get source code, would  
16 it come on a CD or a digital tape as "Here is Dynix," or  
17 how would it be provided to a customer?  
18 A. I don't actually recall how the distribution  
19 was done.  
20 Q. Would it separate out, this part is Unix  
21 System V; this part is BSD; this is Sequent's changes,  
22 additions, modifications?  
23 A. The source code distributions that I recall  
24 were piecemeal, that as they -- for instance, it was a  
25 parallel programming library that was distributed. They

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1 were specific to -- the one that I recall very precisely  
2 is that in working with Oracle, we needed their help to  
3 modify a particular treatment so that Oracle would run  
4 better.  
5 Q. So --  
6 A. So it was a piece, is the short answer.  
7 Q. So is Oracle the only company that you can  
8 recall Sequent ever providing access to source code?  
9 MR. KAO: Objection to form.  
10 THE WITNESS: There probably were others.  
11 That's the one I recall.  
12 MR. HEISE: Q. So whenever Sequent would  
13 provide Dynix to customers, with the exception of Oracle  
14 and possibly a few others, it was always in object code  
15 format?  
16 A. The typical distribution was object, yes.  
17 Q. Would the object code format encompass all of  
18 Dynix, including the BSD portions, the Unix System V  
19 portions, and whatever changes, modifications,  
20 derivative works that Sequent created for Dynix?  
21 A. If your meaning is that, for instance, for the  
22 System V environment, there would be header files that  
23 are different and the object code to do the conditional  
24 symbolic link treatment was included in that object  
25 code, yes.

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1 Q. It would be one unified product that would be  
2 given to a customer?  
3 MR. KAO: Objection.  
4 MR. HEISE: Q. Wouldn't be in bits and  
5 pieces, would it?  
6 MR. KAO: Objection to form.  
7 THE WITNESS: Well, now there were optional  
8 components. I mean, you didn't get everything.  
9 MR. HEISE: Q. What would be an optional  
10 component?  
11 Well, first, you said, "... now there are  
12 optional components." Was that a change, or is that how  
13 it always was?  
14 A. No, it was always -- starting at the  
15 beginning, there was only one product; but --  
16 Q. Well, what are you refer- --  
17 A. -- after there were subsequent developments to  
18 enhance the product, then the customer didn't, for  
19 example, get the compiler if they didn't buy the  
20 compiler.  
21 Q. So is that what you're referring to when you  
22 talk about "optional components," the compiler?  
23 A. That's an example.  
24 Q. What else are you referring to when you say  
25 "optional components"?

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1 A. The parallel programming library was another  
2 example. I'm trying to recall now what else we made  
3 optional.

4 Q. Can you think of anything else?

5 A. No. I don't have a good recall of what was  
6 optional.

7 MR. HEISE: Why don't we just take a  
8 couple-minute break. I need to . . .

9 THE VIDEOGRAPHER: Going off the record. The  
10 time is 10:50.

11 (Recess taken.)

12 THE VIDEOGRAPHER: We are back on the record.  
13 The time is 11:03.

14 MR. KAO: I think at the break Mr. Rodgers had  
15 the opportunity to review the software agreement with  
16 respect to the provision that he was looking for that  
17 was vague, and so he would like to clarify for the  
18 record.

19 MR. HEISE: Q. Sure.

20 A. I apologize. I was looking for an open  
21 parenthesis, and actually, there's no parenthetical note  
22 in the agreement.

23 Q. What phrase are you looking for now?

24 A. It's actually in -- I think it's 7.06(a). And  
25 the phrase is "at any time becomes available without

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1 restriction to the general public." That phrase.

2 Q. And just so that this is all in context,  
3 you're identifying the phrase that "at any time becomes  
4 available without restriction to the general public"  
5 from Section 7.06(a) as something that you find to be  
6 unclear or ambiguous, as you sit here today. It's not  
7 something that you found unclear and ambiguous at the  
8 time that the agreement was entered into. Is that  
9 correct?

10 A. No. What I was saying is that at the time, my  
11 interpretation of that phrase was based upon my  
12 experience with other confidentiality agreements. It's  
13 not explicit in this agreement, but it requires  
14 interpretation from context.

15 Q. What was your understanding at the time  
16 leading up to the execution of this agreement what this  
17 phrase meant, based on your experience?

18 A. As I stated, I think in response to Mr. Kao's  
19 question, it was either as publicly disclosed by the  
20 originator or the information is independently derived  
21 or becomes public through the result of a court  
22 proceeding.

23 Q. I'm having trouble understanding, based upon  
24 what you've described as your understanding what  
25 similar-type phrases mean in your experience, what is

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1 unclear about this particular phrase as identified by  
2 you in 7.06 about becoming available without restriction  
3 to the general public.

4 A. Your question was: Is this -- in essence,  
5 was: Where did I find this document vague? And my  
6 response was, in this particular respect, most such  
7 documents are more explicit and so you're forced to rely  
8 upon context or experience.

9 Q. Is there anything else in this document  
10 besides what we've discussed in 1.04 and 7.06?

11 A. I think we also covered 2.01, because it  
12 relies on the software product definition is open to  
13 interpretation. The paragraph itself is not vague, but  
14 the interpretation is open.

15 Q. Okay. In reviewing paragraph 5 of your  
16 declaration, sir, we talked about much of this when  
17 Mr. Kao was examining you, and I just want to follow up  
18 on a few points.

19 Here you indicate that you did not personally  
20 negotiate. In your mind, who was it that was personally  
21 negotiating this agreement?

22 A. Roger Swanson.

23 Q. Okay. So not the other executives you  
24 identified, Mr. Beck or Mr. Kasten. It was really Roger  
25 Swanson that was negotiating?

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1 A. Correct.

2 Q. Are there any other Sequent employees besides  
3 Mr. Swanson, Mr. Beck, or Mr. Kasten with whom you  
4 reviewed these agreements before signing on behalf of  
5 Sequent?

6 A. It's possible. I don't have a specific  
7 recollection.

8 Q. Given that, would it be fair to assume you  
9 don't have a specific recollection of discussions with  
10 these other possible Sequent employees?

11 A. That's accurate.

12 Q. Okay. Hate to beat something to death, but  
13 occasionally you have to.

14 Later on in this paragraph you state that you,  
15 quote, have personal knowledge of the parties'  
16 understanding of, and intent behind, the terms and  
17 conditions of the agreements.

18 Could you tell us where you get your personal  
19 knowledge of AT&T's understanding of the terms and  
20 conditions of the agreements?

21 A. It would have come through either the  
22 conference calls or a recounting of the consultations  
23 with AT&T coming from Roger and others.

24 If I can be more specific, there are elements  
25 of the System V source code that, by the nature of the

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1 Unix operating environment, have to be exposed to the  
2 customer. And it's just how the system is built. The  
3 system uses text files for configuration. The system,  
4 as I've previously said, uses header files to bind  
5 things in.

6 So we had to clarify the AT&T intent, because  
7 the definition of "software product" was so wide-open  
8 that no, they didn't mean make it unusable; they meant  
9 just don't expose, in bulk, the source code.

10 Q. Well, besides the header files being allowed  
11 to be exposed, what else was discussed between Sequent  
12 and AT&T that could be exposed before you entered into  
13 this agreement?

14 THE WITNESS: Again --

15 MR. KAO: Objection to form.

16 You can answer.

17 THE WITNESS: I don't have a specific  
18 recollection. What I can recount to you is just that  
19 there are -- because Unix is built with a lot of text  
20 files that are meant to be interpreted or used as  
21 configuration information, there are elements of the  
22 operating system that are open, that just have to be  
23 open. That's the nature of the operating system.

24 MR. HEISE: Q. Was it your understanding,  
25 then, that as a licensee of Unix System V, that you

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1 could provide or make public the header files of Unix  
2 System V or the text files of Unix System V?

3 MR. KAO: Objection to form.

4 You can answer.

5 THE WITNESS: Yes, certain of those things are  
6 necessary.

7 MR. HEISE: Q. That's what I'm trying to, you  
8 know, winnow down as to what you mean by that. Let's  
9 just stick with the header files, for example.

10 What in the header files was discussed that  
11 could be made publicly available by Sequent without  
12 Sequent violating the terms of confidentiality?

13 MR. KAO: Objection to form.

14 You can answer.

15 THE WITNESS: I don't have a specific  
16 recollection about what was discussed, but the header  
17 files, in their entirety -- certain header files, in  
18 their entirety, have to be exposed.

19 MR. HEISE: Q. Which header files have to be  
20 exposed publicly from Unix System V?

21 A. You're asking a question I can't answer from  
22 own knowledge.

23 Q. Then how do you know that header files must be  
24 exposed from System V?

25 A. As a person experienced using Unix.

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1 Q. Okay. What about text files? What text  
2 files, if any, were discussed between Sequent and AT&T  
3 that you understood could be publicly displayed from  
4 Unix System V?

5 A. Again, we probably wouldn't have discussed it  
6 at the level of it's RC1.txt or something like that. We  
7 would have discussed it as the system configuration  
8 files or the disk table or things like that.

9 Q. Okay. So besides header files and text files,  
10 was anything else discussed that you believe Sequent  
11 could publicly display from Unix System V and still be  
12 in complete compliance with the terms of the software  
13 agreement?

14 MR. KAO: Objection to form.

15 THE WITNESS: We would have also had to  
16 confirm that we could document known defects. When the  
17 product is distributed in binary form, you have to be  
18 able to tell your customers "Don't rely on the CPO-H  
19 parameter." And that would be a reference to a System V  
20 component, but it's referring to a defect in that  
21 component.

22 MR. HEISE: Q. Well, would you provide them  
23 the source code for that component?

24 A. No, we would not.

25 Q. So there's still -- just telling a customer

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1 that gets it in only the binary, the 1s and 0s, that  
2 there's a defect in X portion is not identifying  
3 System V code or modification or derivative work, is it?

4 A. Well --

5 MR. KAO: Objection to form.

6 THE WITNESS: That's where the definition of  
7 "software product" causes the problem, because it's so  
8 expansive, it includes the documentation, which includes  
9 the release notes, which includes the defect list. So  
10 that's where it gets tangled up.

11 MR. HEISE: Q. Okay. So that was your  
12 concern, by way of example: Identifying for a customer  
13 that X has a defect is somehow violating the terms of  
14 the confidentiality clause as written in this agreement?

15 A. If you interpret it --

16 MR. KAO: Objection to form.

17 THE WITNESS: -- the way it's written, yes,  
18 that could cause you a problem.

19 MR. HEISE: Q. Any other examples that were  
20 discussed with AT&T besides this header files, text  
21 files, or defect notes?

22 A. I wouldn't have been party to the whole of the  
23 conversation.

24 Q. Did you ever see any correspondence between  
25 Sequent and AT&T regarding Sequent's belief that it



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<p style="text-align: right;">Page 113</p> <p>1 could, in full compliance with the agreement, disclose  2 header files, text files, or identify in defect notes?  3 A. I did not.  4 MR. KAO: Objection to form.  5 MR. HEISE: Q. Did you see correspondence  6 regarding Sequent's ability to reveal anything from  7 System V other than what I just described? So that I'm  8 not limiting it just to header files, text files, and  9 defect notes.  10 A. I did not.  11 Q. These conversations that we've been discussing  12 about the -- what you've characterized as the intent  13 behind the terms and conditions of the agreements, were  14 these conversations that took place before entering into  15 this agreement?  16 A. Yes.  17 Q. Were there any conversations afterwards?  18 A. I'm sure there were. I don't have a specific  19 recollection.  20 Q. So you cannot relate to us any of the  21 conversations that took place after the agreement was  22 executed regarding what you've described as the intent  23 behind the terms and conditions of the agreements?  24 A. No, not with any precision.  25 Q. In paragraph 6, you start with:</p>	<p style="text-align: right;">Page 115</p> <p>1 Q. What documentation?  2 A. There's a set of man pages, they're called,  3 which document the commands.  4 Q. Anything else?  5 A. I'm sure there were release notes and various  6 other pieces of descriptive information.  7 Q. Anything else?  8 A. Not to my specific recollection.  9 Q. The phrase "for its internal business  10 purposes," we talked about this earlier. That appears  11 in Section 2.01; is that correct?  12 A. Mm-hmm.  13 Q. You have to say "yes" or "no" out loud.  14 A. Sorry. Yes.  15 Q. What did you understand "internal business  16 purposes" to mean?  17 A. Our intent -- I'll start with that -- was to  18 use the System V materials to create the derivative  19 work. How I interpret internal business purposes is for  20 anything that might please the company. So we might  21 have done a benchmark on a System V platform, which I do  22 recall that we did. So it would have been anything we  23 chose to do for our own education and satisfaction.  24 Q. In other words, keep it within Sequent?  25 A. Yes.</p>
<p style="text-align: right;">Page 114</p> <p>1 "It was my understanding that the licensing  2 agreements that I executed were standard form  3 agreements . . . ."  4 From whom did you get that understanding?  5 A. I don't know the name of the person. It would  6 have been one of the AT&amp;T representatives who portrayed  7 the documents as a standard form license agreement.  8 Q. So it was strictly a statement by someone. It  9 wasn't that you had seen other AT&amp;T agreements for  10 software code?  11 A. That's correct.  12 Q. Continuing on in this declaration that you  13 signed, in your second sentence you state:  14 "The Software Agreement granted Sequent the  15 right to use Unix software products,  16 including source code, for its internal  17 business purposes."  18 The way that this sentence was written and  19 which you signed, you seem to indicate that Unix  20 software products is something more than source code.  21 A. Yes.  22 Q. What did you understand the Unix software  23 products to be besides source code?  24 A. It also includes the object code for the  25 unmodified System V, includes the documentation.</p>	<p style="text-align: right;">Page 116</p> <p>1 MR. KAO: Objection to form.  2 MR. HEISE: Q. You continue on that:  3 "The agreement further provided [sic] Sequent  4 the right to modify Unix software products  5 and to prepare derivative works based upon  6 such software products."  7 A. Yes.  8 Q. What did you understand it to mean that, as  9 you say here, that Sequent had the right to modify Unix  10 software products?  11 A. So modifications can take two forms. They can  12 either be an augmentation, the creation of a new  13 capability; or they can be an adaptation, making  14 something that would work except for some minor  15 incompatibility. And I gave some examples earlier about  16 symbol definitions and character sets and things like  17 that as an example of the latter.  18 Q. And if Sequent -- well, could you tell us  19 what, if anything, from Unix System V that Sequent  20 modified?  21 A. In either sense?  22 Q. In either sense of how you are defining  23 "modification."  24 A. Yes. The two examples that I can recall  25 precisely are we modified the way in which Unix System V</p>

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1 semaphores work in order to perform better. The  
 2 semantics of a -- perhaps I should say that a semaphore  
 3 is a software object that allows for multiple users of a  
 4 single resource to coordinate their access to that  
 5 single resource so that they don't collide.

6 The meaning of a semaphore in System V is  
 7 different than the meaning of a semaphore release in  
 8 BSD, and the consequence of that difference in meaning  
 9 is that System V is less efficient. So in the case of  
 10 Sequent, we modified, in the sense of augmentation, the  
 11 way that System V semaphores work so that they were as  
 12 efficient as the Dynix operating system made them be.

13 Q. Just to interrupt your train of thought for  
 14 just one second, when you talk about the System V  
 15 semaphores, is that also sometimes referred to as  
 16 System V IPCs?

17 A. IPC is one of the users of it, but that's  
 18 not -- it's not the same.

19 Q. So it's a subset of semaphores, or am I  
 20 overstating?

21 A. Interprocess communication is a bigger concept  
 22 than -- than a semaphore.

23 Q. Okay. I didn't mean to interrupt. So you  
 24 were saying the things that you believed that Sequent  
 25 modified from System V is modified the way that the

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1 semaphores work. Is there anything else?

2 A. I'm sure there were many other things, but --  
 3 and not least of which is adapting System V to run in a  
 4 large-scale multiprocessor environment, to do resource  
 5 management in a way that was more efficient with a large  
 6 number of processors.

7 A small diversion here. The common wisdom at  
 8 the time was that -- driven largely by the mainframe  
 9 world, was that multiprocessors stopped being more  
 10 efficient than uniprocessors at about four processors,  
 11 which was a true statement but only true because of the  
 12 way that the operating systems were implemented.

13 So coming back to your question, there were  
 14 lots of modifications underneath the covers that allowed  
 15 for the System V semantics to be expressed in an  
 16 efficient way on a larger-scale multiprocessor.

17 Q. Well, if I were to look at Dynix code, for  
 18 example, how would I be able to determine the  
 19 modifications of the System V semaphores that now  
 20 appears in the Dynix code?

21 A. The simple answer is I don't know. The more  
 22 complicated answer is if the software developer was  
 23 being a good boy that day, they would have commented it.

24 Q. The comment would have indicated that "These  
 25 semaphores are from System V, and I've changed it by

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1 doing X, Y and Z"?

2 A. Yes.

3 Q. Are there any other instances that you can  
 4 identify for us where Sequent modified System V code for  
 5 use in any of its Dynix products?

6 A. I'm struggling to think of another example.  
 7 But I would say, generally, there were also lots of  
 8 adaptations where the system product code was modified  
 9 in some largely cosmetic way to make it compatible with  
 10 the compiler technology we were using. For a variety of  
 11 reasons, the binary output format for System V and the  
 12 binary output format for Berkeley are different in a  
 13 incompatible way. And so we would have done  
 14 adaptations, essentially low-value changes, so that the  
 15 binary output formats could be compatible.

16 Q. If I'm trying to determine all of the  
 17 instances of modifications, meaning either new or  
 18 adaptations, in Dynix that came from System V and a  
 19 developer was not being a good boy that day, how would I  
 20 go about determining anything else that was modified  
 21 or -- modified from System V?

22 MR. KAO: Objection to form.

23 THE WITNESS: First, I would say it would be  
 24 an extremely difficult assignment because the  
 25 modifications would have taken place over an extended

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1 period of time by many people.

2 An approach that I would adopt, if I were  
 3 given that assignment, is to see if I could recover the  
 4 RCS logs. Sequent, like many companies, maintain a  
 5 source control system called RCS; and I would attempt to  
 6 recover, from some archival storage medium, the RCS  
 7 logs.

8 MR. HEISE: Q. In this same sentence that we  
 9 were just discussing -- we just got done talking about  
 10 the modification to the Unix System V. What was your  
 11 understanding of the right to, quote, prepare derivative  
 12 works based upon such products, meaning Unix System V?

13 A. I think my interpretation is straightforward.  
 14 It means incorporate some or all of the source code, the  
 15 object code, or the documentation into a resultant  
 16 source, object, or document.

17 Q. Can you identify for us, in Sequent's Dynix  
 18 products, any source, object, or documentation that was  
 19 incorporated from Unix System V?

20 A. I don't have specific knowledge.

21 Q. Do you know whether, in fact, that did take  
 22 place?

23 A. Well, we can infer from the earlier discussion  
 24 that certainly some of the parameterization files might  
 25 have been incorporated and certainly some of the release

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1 notes might have been incorporated.

2 Q. If I were to attempt to determine the source,  
3 object -- the source code, the object code, or the  
4 documentation that was incorporated from System V into  
5 some version of Dynix, how would I go about doing that?

6 MR. KAO: Objection to form; calls for  
7 speculation.

8 THE WITNESS: That's a near impossibility.

9 MR. HEISE: Q. Well, your answer is  
10 100 percent right, because for me to go about doing that  
11 is an impossibility. So maybe I should rephrase the  
12 question.

13 For you to determine what source code, object  
14 code or documentation from Unix System V appears, either  
15 in whole or in part, in Dynix, what steps would you have  
16 to undertake?

17 MR. KAO: Objection to form.

18 THE WITNESS: First, let me say, I am not a  
19 forensic expert in document comparison.

20 MR. HEISE: Q. Right.

21 A. So my first step would be to go find one.

22 But the techniques that are well understood  
23 are that you scan the relevant material for repeating  
24 patterns that are above chance probability. And that's  
25 true for whether those repeating patterns are in source

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1 code or documents or object code.

2 Q. From the time that the software agreement was  
3 executed in 1985, how many versions of Dynix or  
4 Dynix/ptx did Sequent create?

5 A. I don't know a precise number. Once again, a  
6 small number. Releases happened maybe once a year, but  
7 I don't have a precise number.

8 Q. Not limiting your answer to release, how many  
9 changes would occur between, let's say, Release 1 and  
10 Release 2? And I'm just making up numbers just for  
11 discussion purposes. Would there just be, you know, two  
12 or three minor changes, or would it go through numerous  
13 changes between Release 1 and Release 2 that the public  
14 actually saw?

15 MR. KAO: Objection to form.

16 THE WITNESS: There would be probably  
17 thousands of changes between releases.

18 MR. HEISE: Q. Would those changes either  
19 appear in the programmer's notes in the code or on the  
20 RCS, the control system?

21 A. The check-ins would occur in the RCS logs.  
22 The developer might make small changes, a few changes,  
23 or large changes, hundreds or even thousands of changes  
24 between check-ins. There's no way to know that.

25 Q. You're going to have to forgive me because I'm

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1 not a hundred percent sure what you mean by "check-ins."

2 A. Sorry.

3 Q. So if we could just take one step backwards.

4 If here is Version 1 of Dynix or Dynix/ptx,  
5 one of the Sequent products, a programmer, you said,  
6 checks in on the RCS log. What does that mean?

7 A. Let me start with a just a high-level  
8 description.

9 Q. Okay.

10 A. As with, I'm sure, preparation of legal  
11 documents, if you have more than one contributor, you  
12 have the problem of synchronizing the contributions.

13 So in the case of source code, some tool -- in  
14 the Sequent case, it was called RCS -- would provide a  
15 mechanism where a copy would be checked out, meaning  
16 removed from access by others, and that copy is then  
17 assigned to a particular developer. They'll do whatever  
18 changes or inspection, whatever modification they need  
19 to make; and then they will restore the now modified  
20 version to full access, to check it in to the source  
21 control system. At that point that it's checked in,  
22 it's now accessible to some other developer to make  
23 their changes.

24 Q. Given that Sequent certainly had more than one  
25 engineer, if, for example, you've checked out your --

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1 and you're working on a particular version and then  
2 Engineer No. 2 is also working -- I guess Engineer No. 2  
3 cannot also be working on that same version that you  
4 checked out.

5 A. Unfortunately, yes, they can. And herein lies  
6 the bigger challenge, in that it's perfectly acceptable  
7 for the developer who's checked it out to second a copy  
8 to another developer, and then they take upon themselves  
9 the task of reconciling any incompatible changes.

10 Q. Okay. So to be able to identify the changes  
11 which would include incorporating System V source code  
12 or object code, the first step, from what you've  
13 described, would be get the RCS logs?

14 MR. KAO: Objection.

15 MR. HEISE: Q. Is that correct?

16 MR. KAO: Objection to form.

17 THE WITNESS: That would be my approach.

18 MR. HEISE: Q. And if you didn't have access  
19 to the RCS logs, how would you go about determining what  
20 Unix System V source code, object code, or documents  
21 were incorporated, in whole or in part, into Dynix?

22 MR. KAO: Objection to form.

23 THE WITNESS: Again, I do not qualify as  
24 someone --

25 MR. HEISE: Q. I understand.

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<p style="text-align: right;">Page 125</p> <p>1 A. -- who can do this; but my approach, if that 2 was your question, would be to get some sort of 3 comparison tool -- and there are now some very 4 sophisticated ones that are being used by universities 5 to detect plagiarism -- identify suspect areas, and then 6 have a software expert identify whether the similarity 7 that arose in that -- as a result of that activity was 8 as a consequence of the movement of source code or 9 simply because the algorithm required that particular 10 expression. 11 Q. And just to put this in context, how many 12 lines of code does Dynix -- a version of Dynix comprise? 13 A. Oh, I have no idea today. I would guess that 14 it's on the order of 1 to 2 million. 15 Q. And what about the Unix System V code that 16 you'd have to be comparing it against? 17 A. System V.2 is actually pretty small, if you 18 exclude the utilities and the -- 19 Q. Right. 20 A. -- things like that. 21 So it wouldn't be huge. It would be in the 22 hundreds of thousands maybe. 23 Q. And then you would have to get this computer 24 program to do the comparison for you? 25 A. Right.</p>	<p style="text-align: right;">Page 127</p> <p>1 "I did not understand this language to give 2 AT&amp;T Technologies the right to assert 3 ownership or control over modifications or 4 derivative works prepared by Sequent, except 5 to the extent that the licensed Unix software 6 product was included in such modifications or 7 derivative works." 8 Rather than telling us what you did not 9 understand this language to give AT&amp;T Technologies the 10 right to, what did you understand it, in fact, did give 11 AT&amp;T the right with respect to Sequent? 12 MR. KAO: Objection to form. 13 THE WITNESS: My understanding of AT&amp;T's 14 rights were to the ownership, authorship and ownership 15 of the source code that was delivered to Sequent and, to 16 such extent as that source code was carried forward in 17 the derivative work, that ownership prevailed; the 18 consequence being that they had a right to control the 19 distribution of the portions which they owned. 20 MR. HEISE: Q. Well, what I don't understand, 21 sir -- and hopefully you can clear up for us -- is 22 nowhere in Section 2.01 does the word "own" or 23 "ownership" or "control" appear. So where is it that 24 you're coming up with your understanding of what this 25 language did not do?</p>
<p style="text-align: right;">Page 126</p> <p>1 MR. KAO: Objection to form. 2 THE WITNESS: And most importantly, you'd have 3 to -- once you had suspect areas, you'd have to have 4 someone who is a technical expert in the expression of 5 algorithms say, "Yeah, it's for sure that that's a copy 6 of the source code because it's written so badly" or 7 some other reason; or "Oh, no. There's only one way to 8 express that." 9 And I gave an example earlier. There's really 10 only a couple of ways to do digit production when you're 11 printing, and so everybody's going to write the same 12 code. 13 MR. HEISE: Q. Right. That, of course, is a 14 time-consuming task? 15 A. Yes. 16 MR. KAO: Objection to form. 17 MR. HEISE: Q. With respect to Section 7 of 18 your affidavit, you are making reference to 19 Section 2.01. 20 A. Let me -- yes, I am. 21 Q. And in particular, you quote the portion that 22 appears in the second sentence of 2.01. 23 A. Yes. 24 Q. I'm curious, in Section 2.01, you identify in 25 the next sentence, you state:</p>	<p style="text-align: right;">Page 128</p> <p>1 MR. KAO: Objection to form. 2 THE WITNESS: The keyword in my reading of 3 Section 2.01 of the document is in the last phrase: 4 "... provided [that] the resulting materials 5 are treated hereunder as part of the original 6 SOFTWARE PRODUCT." 7 MR. HEISE: Q. Right. 8 A. So "treatment," again, is an open-ended word. 9 Treated in what context? 10 Q. What did you understand them to be treated? 11 A. So my understanding of the word "treated" here 12 was with regard to confidentiality, not with regard to 13 intellectual property ownership. 14 Q. So then what you understood on Section 2.01 15 was that it was not discussing ownership but, instead, 16 was stating that the right to use includes the right to 17 modify and to prepare derivative works, providing the 18 resulting materials are treated confidentially? 19 MR. KAO: Objection to form. 20 MR. HEISE: Q. Is that what you're telling 21 us? 22 A. Yes. 23 Q. Did Sequent maintain in confidence its Dynix 24 source code? 25 A. To the best of my knowledge, we did.</p>



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<p style="text-align: right;">Page 129</p> <p>1 Q. Other than, I think you said, Oracle having a  2 right to view Dynix's source code -- first, when Oracle  3 got the right to view Dynix source code, did it do so  4 pursuant to a license from Sequent?</p> <p>5 A. It was -- I can't say that it was a license  6 agreement. I'm sure there was a confidentiality  7 agreement.</p> <p>8 Q. Do you know whether Oracle or any other  9 company that was allowed to see Sequent's Dynix code was  10 also required to get a source viewing license from AT&amp;T  11 or any of its successors, including SCO?</p> <p>12 MR. KAO: Objection to form.</p> <p>13 THE WITNESS: I don't know that with  14 certainty. I recall anecdotally that we did check with  15 other companies with whom we partnered to do development  16 that they had an AT&amp;T license.</p> <p>17 MR. HEISE: Q. So, to your knowledge, Dynix  18 code was always maintained in confidence?</p> <p>19 A. To the best of my knowledge.</p> <p>20 Q. Do you know whether at any point in time Dynix  21 code has not been maintained in confidence?</p> <p>22 MR. KAO: Objection to form.</p> <p>23 THE WITNESS: Now you have to be specific with  24 respect to which portion of Dynix code.</p> <p>25 MR. HEISE: Q. Any portion of Dynix code.</p>	<p style="text-align: right;">Page 131</p> <p>1 code that have been made publicly available besides this  2 distribution kit?</p> <p>3 A. Not explicitly.</p> <p>4 Q. Do you know whether any portions of Dynix have  5 been made available publicly by contribution of it to  6 Linux?</p> <p>7 A. I don't know that from own knowledge. I've  8 heard that reported.</p> <p>9 Q. From whom have you heard it reported?</p> <p>10 MR. KAO: I guess I would caution you, to the  11 extent you learned things from counsel, you're not to  12 disclose that; but if you learned such information from  13 anywhere else --</p> <p>14 THE WITNESS: Yeah.</p> <p>15 MR. KAO: -- you can testify to that.</p> <p>16 THE WITNESS: I've seen some Web article, or  17 something like that, that talked about various  18 contributions.</p> <p>19 MR. HEISE: Q. Other than the distribution  20 kit, some Web article that you may have seen regarding  21 Dynix code being contributed to Linux, are you aware of  22 any other instance in which Dynix code was made publicly  23 available?</p> <p>24 A. None to my explicit knowledge.</p> <p>25 Q. Why would -- why was it important to Sequent</p>
<p style="text-align: right;">Page 130</p> <p>1 A. And so as I've previously explained, certain  2 elements of Dynix which were wholly created by Sequent  3 have been made available. And as a consequence of the  4 design of the operating system, specific pieces of the  5 Dynix operating system are routinely made public.</p> <p>6 Q. If we could, I'd like to address those  7 separately.</p> <p>8 You said certain elements of Dynix code have  9 been made publicly available. What elements of Dynix  10 code have been made publicly available?</p> <p>11 A. The one that I explicitly know about is the  12 parallel programming library.</p> <p>13 Q. How was that made publicly available?</p> <p>14 A. There was a little distribution kit made, and  15 there was a little handbook published.</p> <p>16 Q. And when was that done?</p> <p>17 A. A long time ago. Maybe '85, '84 sometime.</p> <p>18 Q. So sometime prior to entering into the  19 agreement with AT&amp;T?</p> <p>20 A. I don't know the timing.</p> <p>21 Q. Well, if it was '84, it would have been  22 before; if it was '85, it would have been right around  23 that time.</p> <p>24 A. Yeah.</p> <p>25 Q. Are you aware of any other elements of Dynix</p>	<p style="text-align: right;">Page 132</p> <p>1 to keep the Dynix code confidential?</p> <p>2 MR. KAO: Objection to form.</p> <p>3 THE WITNESS: At the time -- times, of course,  4 change; but at the time, Sequent had a performance and a  5 stability advantage over its competitors because of the  6 way in which we implemented the parallel processing and  7 the resource allocation. And like all trade secrets, I  8 mean, it has some value at the time.</p> <p>9 Eventually, as happens in the computer  10 industry, somebody figures out how to do it in a nother  11 way and then you're done.</p> <p>12 MR. HEISE: Q. Right. Now, you also  13 indicated that you thought certain portions of Dynix,  14 based upon its design, were routinely made publicly  15 available. What specifically are you referring to?</p> <p>16 A. I'm just referring to the release notes which  17 describe defects, the configuration files, the header  18 files, as we have talked about.</p> <p>19 Q. You're not including source code in that?</p> <p>20 A. Not including algorithmic source.</p> <p>21 Q. Now, with respect to 2.01 and your  22 understanding that it meant to keep the resulting  23 materials as confidential, I still don't understand how  24 it is that from that you are indicating your view that  25 you did not understand this language to cover subjects</p>

33 (Pages 129 to 132)

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<p style="text-align: right;">Page 133</p> <p>1 such as ownership and control that are nowhere mentioned 2 in there. 3 MR. KAO: Objection to form. 4 THE WITNESS: Well, I think that's my point, 5 is that the word "treated" is pretty open-ended. 6 MR. HEISE: Q. And I understand that's your 7 statement and that you've said you believe that to mean 8 to be covering confidential -- 9 A. Right. 10 Q. -- or confidentiality requirements. 11 A. So if you're asking how did I come to that 12 understanding of the word "treated," it was through a 13 conversation with the AT&amp;T guys. 14 Q. Tell us about that conversation. 15 A. You know, I don't think I can recount it word 16 for word, but it would have been along the lines of 17 "You're certainly not trying to capture my source code." 18 And it's not something I would have done or 19 even could have done. 20 Q. Well, when you say "capture," are you talking 21 about that AT&amp;T indicated to you that it would not be 22 claiming ownership in -- 23 A. Yes. 24 Q. -- Dynix? 25 A. That's correct.</p>	<p style="text-align: right;">Page 135</p> <p>1 would grant ownership or control to AT&amp;T 2 Technologies . . . ." 3 And then you continue on. Is this a statement 4 on your part as to what you would do, or is this a 5 statement of Sequent's corporate position? 6 MR. KAO: Objection to form. 7 THE WITNESS: I think it can be interpreted 8 both ways; that is, acting on behalf of Sequent, I was 9 not authorized to bargain away the intellectual property 10 rights of Sequent's investment of years in the Dynix 11 source code. 12 As an individual -- and I hope that, you know, 13 I wasn't being made a fool by the AT&amp;T lawyers. As an 14 individual, I did not interpret this language and the 15 words of explanation that were given to me as meaning 16 that AT&amp;T had any -- was making any attempt to take 17 control of my source code. 18 MR. HEISE: Q. Did you understand, when you 19 viewed the word "treated" as restricting 20 confidentiality, that that was going to place 21 restrictions on your source code? 22 MR. KAO: Objection to form. 23 THE WITNESS: Yes, with regard to disclosure. 24 MR. HEISE: Q. And in fact, from what you've 25 described to us, other than what you may have read in a</p>
<p style="text-align: right;">Page 134</p> <p>1 MR. KAO: Objection to form. 2 MR. HEISE: Q. Do you understand there to be 3 a difference between ownership and control? 4 A. There can be. 5 Q. What's your understanding of the difference 6 between ownership and control? 7 A. I mean, to own something means that I have the 8 right to dispose of it as I choose. To control 9 something -- examples might be restrictive covenants in 10 a deed or something like that -- simply means that I 11 have the ability to restrain certain actions. 12 Q. Would you agree that the ability to restrain 13 certain actions would also include the right to dictate 14 what an owner of the property can do with that property? 15 MR. KAO: Objection to form. 16 THE WITNESS: As in my example, yes. 17 MR. HEISE: Q. And included in your example, 18 would it be that the fact that somebody owns something, 19 they can be restricted in disposing of what it is that 20 they own? 21 MR. KAO: Objection to form. 22 THE WITNESS: It's possible. 23 MR. HEISE: Q. Now, you conclude in 24 paragraph 7 that you never -- I quote: 25 "I would never have signed an agreement that</p>	<p style="text-align: right;">Page 136</p> <p>1 Web posting, Dynix -- or excuse me -- Sequent did not 2 make public Dynix that contained Unix System V at any 3 point in time? 4 MR. KAO: Objection to form. 5 THE WITNESS: Not to my knowledge. 6 MR. HEISE: Q. Based upon what we've 7 discussed so far, I'd like to clarify your understanding 8 of Dynix. 9 Is it your understanding, as you sit here 10 today, that Dynix or Dynix/ptx contains some or no part 11 of Unix System V? 12 A. First, let me state, I don't know -- 13 Q. Okay. 14 A. -- today. I have no idea. 15 Q. Well, how about let's then take you back to a 16 time when were you there last in 1996. 17 A. In the past, I think I can state with 18 reasonable confidence that Dynix did not contain any 19 System V source code -- 20 Q. Okay. 21 A. -- given its derivation. 22 I can be reasonably certain that Dynix/ptx had 23 some elements of System V source code embodied in it; in 24 particular, some of the utilities. 25 Q. Would you agree then that with Dynix/ptx</p>

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<p style="text-align: right;">Page 137</p> <p>1 embodying or containing Unix System V, that it was  2 subject at least to this confidentiality restriction  3 that we've been discussing?  4 A. Those portions --  5 MR. KAO: Objection to form.  6 THE WITNESS: -- which were derived from  7 System V, yes.  8 MR. HEISE: Q. And we've already discussed  9 about how you would, at least according to you, go about  10 and identify those, quote, portions of Dynix.  11 A. Yes.  12 Q. Why is it that you believe it only restricts  13 those portions as opposed to Dynix/ptx?  14 A. Because in my interpretation, the restrictions  15 apply to those things which are owned by AT&amp;T and do not  16 apply to those things which are owned by Sequent.  17 Q. And according to the way that you're  18 interpreting this, only if you found actual System V  19 source code, that's the only thing that could not be --  20 that had to be treated confidentially?  21 A. Essentially. We've talked earlier about the  22 methods and procedures issue as well.  23 Q. We're going to get to that, but I'm trying to  24 just follow the format of your --  25 A. Yeah.</p>	<p style="text-align: right;">Page 139</p> <p>1 "Dynix." So I know you talked about this a little bit  2 earlier, so I just want to see if I can make sure the  3 record's clear.  4 Dynix starts out, and then after Unix System V  5 is licensed, Dynix/ptx is created, but at the same time,  6 they're both being sold. And eventually, does Dynix  7 cease or does it just -- what happens?  8 MR. KAO: Objection to form.  9 THE WITNESS: Both products continue on.  10 Ultimately, the marketplace for Dynix/ptx was larger  11 than the marketplace for Dynix for Sequent.  12 MR. HEISE: Q. Given that statement, that the  13 Dynix/ptx became the larger marketplace, did there come  14 a point in time when Dynix just stopped being worked on  15 or sold and that it was strictly Dynix/ptx?  16 MR. KAO: Objection to form.  17 THE WITNESS: I don't know that from own  18 knowledge. I can't speculate. I don't know.  19 MR. HEISE: Q. In terms of just trying to  20 give us a broad view of Dynix and Dynix/ptx, when  21 Dynix/ptx is where the marketplace was going for the  22 high-end business computing, what is the relative ratio  23 between how much of Sequent was devoted to Dynix/ptx  24 versus its former product of Dynix?  25 MR. KAO: Objection to form.</p>
<p style="text-align: right;">Page 138</p> <p>1 Q. Okay. When you state that you don't know  2 whether Dynix is a derivative work based on Unix  3 System V, what's preventing you from being able to make  4 that determination?  5 A. And you're now saying Dynix or Dynix/ptx?  6 Q. Well, I'm going to -- I'll clarify it as  7 Dynix/ptx.  8 A. Okay.  9 Q. And I guess what I should do -- I'll let you  10 answer the question as to Dynix/ptx; then I'll ask you  11 another question.  12 A. Okay. Dynix/ptx is almost certainly a  13 derivative work of Unix System V.  14 Q. In paragraph 8 of your declaration, sir, you  15 start the sentence with "As I understood the Software  16 Agreement between Sequent and AT&amp;T Technologies . . .,"  17 and then you continue on. I just want to focus on your  18 first part there of --  19 A. Yes.  20 Q. -- "as I understood . . ."  21 Is that from your reading of the agreement  22 only, or is that from some other sources?  23 A. It relies upon my conversations with the AT&amp;T  24 individuals.  25 Q. In paragraph 9 is when you first used the word</p>	<p style="text-align: right;">Page 140</p> <p>1 THE WITNESS: Certainly within development,  2 the bulk of the resources would have been working on  3 Dynix/ptx because it was under development.  4 MR. HEISE: Q. Right.  5 A. And Dynix itself would have been getting, of  6 course, bug fixes and customer support attention from  7 development and probably enhancement. As I've  8 previously described, the hardware platform evolved over  9 time. So with each new hardware platform, then Dynix  10 would get revisited to test it, make it compatible, take  11 advantage of any new hardware.  12 Q. Would it be fair to say that more than  13 50 percent of the company's revenues, expenses,  14 resources, and the like were devoted to Dynix/ptx once  15 that was the product line that was being developed by --  16 MR. KAO: Objection.  17 MR. HEISE: Q. -- Sequent?  18 MR. KAO: Excuse me. Objection to form.  19 THE WITNESS: After some period of time, I  20 would say yes to revenues. Expenses, I would say no to.  21 SG&amp;A was always bigger. And so it depends.  22 MR. HEISE: Q. Okay. That's a fair response.  23 But I think you've made clear Dynix/ptx was on the  24 upswing and Dynix without the ptx was on the downswing.  25 Is that --</p>

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<p style="text-align: right;">Page 141</p> <p>1 MR. KAO: Objection to form.</p> <p>2 MR. HEISE: Q. -- an accurate statement?</p> <p>3 A. It was certainly not being evolved, yeah.</p> <p>4 Q. In terms of your role as the vice president of</p> <p>5 engineering, we know that you at least signed one or</p> <p>6 more license agreements.</p> <p>7 A. Yes.</p> <p>8 Q. What else was encompassed in your role? What</p> <p>9 I'm getting at is to find out what, if any, work you</p> <p>10 were doing on Dynix or Dynix/ptx.</p> <p>11 A. Okay. Let me answer the second question</p> <p>12 first --</p> <p>13 Q. Okay.</p> <p>14 A. -- which is that any work I might have done on</p> <p>15 Dynix/ptx would have been limited to writing a utility</p> <p>16 program or editing a text file for English grammar. You</p> <p>17 would certainly not consider me a contributor to</p> <p>18 Dynix/ptx in any way.</p> <p>19 Q. Okay.</p> <p>20 A. And I referred to myself as the programmer of</p> <p>21 last resort.</p> <p>22 With regard to my duties, my job was</p> <p>23 essentially to maintain the organization. So to recruit</p> <p>24 new engineers, to sustain the engineers that we did</p> <p>25 have, to make sure that they received adequate training,</p>	<p style="text-align: right;">Page 143</p> <p>1 AFTERNOON SESSION 1:02 P.M.</p> <p>2 (Mr. James not present.)</p> <p>3 THE VIDEOGRAPHER: We're back on the record.</p> <p>4 This marks the beginning of Tape No. 3 in the</p> <p>5 deposition of David Rodgers. The time is 1:02.</p> <p>6 MR. HEISE: Q. Sir, just continuing on a</p> <p>7 little bit past where we left off, if I can direct your</p> <p>8 attention to Section 11 of your declaration.</p> <p>9 A. Okay.</p> <p>10 Q. You identified this as the confidentiality</p> <p>11 clause, and I think you indicated earlier that this was</p> <p>12 one of the areas -- although I may be misspeaking, so</p> <p>13 please feel free to correct me -- this was one of the</p> <p>14 areas that you thought had ambiguity in it or was not</p> <p>15 clear at the time that you signed the agreement?</p> <p>16 A. Yes, particularly with regard to methods or</p> <p>17 concepts.</p> <p>18 Q. Okay. Was there anything in Section 7.06 at</p> <p>19 the time that you were discussing and ultimately</p> <p>20 executed the agreement that you thought was unclear or</p> <p>21 ambiguous other than the section pertaining to methods</p> <p>22 or concepts?</p> <p>23 A. No. Again, this paragraph is clear in its own</p> <p>24 sense, although it relies upon the software products</p> <p>25 definition that has some vagueness to it.</p>
<p style="text-align: right;">Page 142</p> <p>1 that there were project plans in place, to monitor the</p> <p>2 project development schedules, to meet with customers,</p> <p>3 and to act as a part of the sales process, and to -- as</p> <p>4 a member of the executive team, to make strategic</p> <p>5 decisions.</p> <p>6 MR. HEISE: Two things that are coming up</p> <p>7 right now. One, we need it take a tape change break.</p> <p>8 THE WITNESS: Okay.</p> <p>9 MR. HEISE: And also, I need to check out of</p> <p>10 the hotel.</p> <p>11 THE WITNESS: Okay.</p> <p>12 MR. KAO: All right.</p> <p>13 THE WITNESS: All right.</p> <p>14 MR. HEISE: If we could just go ahead and --</p> <p>15 MR. KAO: Why don't we just --</p> <p>16 MR. HEISE: -- make this a lunch break,</p> <p>17 MR. KAO: -- go off the record then.</p> <p>18 MR. HEISE: Yeah.</p> <p>19 THE VIDEOGRAPHER: This marks the end of Tape</p> <p>20 No. 2 in the deposition of David Rodgers.</p> <p>21 We're going off the record. The time is</p> <p>22 11:59.</p> <p>23 (Luncheon recess taken at 11:59 a.m.)</p> <p>24 --oOo--</p> <p>25</p>	<p style="text-align: right;">Page 144</p> <p>1 Q. Right. But I'm just focusing you on anything</p> <p>2 else in 7.06 that you thought was unclear at the time</p> <p>3 that you were negotiating or people were negotiating and</p> <p>4 you ultimately executed the software agreement besides</p> <p>5 what you've identified as methods or concepts and now</p> <p>6 referring back to the definition of "software products"</p> <p>7 from Section 1.04. Anything else?</p> <p>8 A. No. That's it.</p> <p>9 Q. Would you agree, then, sir, that the</p> <p>10 restriction was with respect to all parts of the</p> <p>11 software products subject to this agreement and not just</p> <p>12 some parts?</p> <p>13 A. Can you say that --</p> <p>14 MR. KAO: Objection to form.</p> <p>15 THE WITNESS: -- in a different way?</p> <p>16 MR. HEISE: Q. Sure. In reviewing</p> <p>17 Section 7.06, it states that:</p> <p>18 "[The] LICENSEE," meaning Sequent, "agrees</p> <p>19 that it shall hold all parts of the SOFTWARE</p> <p>20 PRODUCTS subject to this Agreement in</p> <p>21 confidence for AT&amp;T."</p> <p>22 Based upon that language, would you agree that</p> <p>23 Sequent was obligated to hold all parts of the software</p> <p>24 products subject to this agreement in confidence for</p> <p>25 AT&amp;T as opposed to just some or -- as opposed to some</p>



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1 parts?  
 2 MR. KAO: Objection to form.  
 3 THE WITNESS: Okay. So as I've previously  
 4 said, with the comprehension that the parts of the  
 5 software product, meaning the source code, the  
 6 algorithmic portion of the source code, but not with  
 7 regard to documentation, some documentation elements,  
 8 some scripting elements.  
 9 So the short answer is no, I don't agree.  
 10 MR. HEISE: Q. Okay. So that's going back to  
 11 your view that the definition of Section 1.04 and  
 12 software products is not clear to you?  
 13 MR. KAO: Objection to form.  
 14 THE WITNESS: Well, I made an assumption at  
 15 the time, clarified by conversation, about what was and  
 16 was not in scope.  
 17 MR. HEISE: Q. And we've talked about that --  
 18 A. We've talked about that.  
 19 Q. -- at length.  
 20 And do you have anything further to add as to  
 21 what you assumed or decided or heard was encompassed in  
 22 software products that we've not already discussed this  
 23 morning?  
 24 A. We've covered it.  
 25 Q. With respect to this statement in

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1 Section 7.06, that it includes methods and concepts as  
 2 being something that will not be disclosed, who did you  
 3 speak to at AT&T that indicated to you that that clause  
 4 of restricting methods and concepts does not apply to  
 5 Sequent?  
 6 A. Again, I don't recall the name of the  
 7 individual. It was whoever Roger had on the call.  
 8 And as I think I mentioned earlier, I'm also  
 9 relying upon my knowledge at the time that many of the  
 10 methods and concepts for Unix were already disclosed by  
 11 other -- other means.  
 12 Q. Well, did you or anyone at Sequent attempt to  
 13 modify the agreement so that it no longer included the  
 14 phrase "including methods or concepts utilized therein"  
 15 so that it would be clear that Sequent was not, in fact,  
 16 restricted in its use of the methods and concepts of  
 17 Unix System V?  
 18 A. Not to my knowledge.  
 19 MR. KAO: Objection to form.  
 20 THE WITNESS: Sorry.  
 21 MR. KAO: Give me a chance to object.  
 22 THE WITNESS: Not to my knowledge. We were  
 23 relying upon the assurances of AT&T folks on how they  
 24 were going to enforce the language.  
 25 MR. HEISE: Q. And those assurances -- I

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1 think we've covered this -- were never in writing  
 2 regarding this methods and concepts clause; is that  
 3 correct?  
 4 A. Not to my knowledge.  
 5 Q. And the reason that you believed that the  
 6 methods and concepts could not be restricted or was not  
 7 subject to the restrictions of this agreement was  
 8 because they appeared in the public?  
 9 A. Many of them, yes, had already appeared in  
 10 public.  
 11 Q. Okay. Could you identify for us the methods  
 12 and concepts of Unix System V that publicly appeared  
 13 that were used in Dynix/ptx?  
 14 MR. KAO: Objection to form.  
 15 THE WITNESS: I can give you an example. I  
 16 certainly can't enumerate all of them.  
 17 MR. HEISE: Q. If you could just tell us all  
 18 that you can identify for us.  
 19 A. So, for example, the notion of a treed  
 20 directory structure, which is fundamental to Unix, is  
 21 well documented in lots of literature. The concept of  
 22 an I-node as a way of traversing a directory tree. The  
 23 concept of dynamic memory allocation. The concept of a  
 24 process identifier.  
 25 Q. Did you say a process identifier?

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1 A. Process identifier, PID. I'm trying to think  
 2 of -- the concept of a file handle.  
 3 There are a whole series of concepts  
 4 associated with Unix around the file system, basically  
 5 treats the file system as an extended text string  
 6 without any real delimiters.  
 7 Q. Anything else, sir?  
 8 A. I'm running out of -- you know, if you get me  
 9 long enough, I might come up with some more, but . . .  
 10 Very many of the concepts are documented and  
 11 well explained in the text that were available at the  
 12 time and certainly in text available since.  
 13 Q. Okay. I noticed in introducing each of these  
 14 categories, you identified them as the concept, for  
 15 example, of a treed structure or as an I-node.  
 16 What about the method of actually implementing  
 17 that concept? Was that also publicly displayed in these  
 18 texts and other public forum that you --  
 19 A. In many cases, yes.  
 20 Q. So you could see the actual manner in which  
 21 the source code was written for I-nodes in System V in  
 22 these texts?  
 23 A. Right. You would typically find a fragment of  
 24 C language programming that would show tree traversal or  
 25 something like that.

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<p style="text-align: right;">Page 149</p> <p>1 Q. And when you talk about a fragment, what do 2 you mean by "a fragment"?</p> <p>3 A. It will be less than all of a source module, 4 but the core lines of code in a source module that are 5 actually doing the work.</p> <p>6 Q. Why would it be limited to merely a fragment 7 in these texts as opposed to the entire file?</p> <p>8 MR. KAO: Objection to form. It calls for 9 speculation.</p> <p>10 MR. HEISE: Q. You can answer.</p> <p>11 MR. KAO: You can answer the question.</p> <p>12 THE WITNESS: Because there's a lot of chaff 13 in a source module. There's usually about a dozen lines 14 of commentary that have a copyright notice and 15 authorship indication and, you know, a few comments 16 about what the intent of the module is.</p> <p>17 And very often, particularly if you're just 18 trying to be illustrative, you don't need to provide all 19 the symbol definitions. Those are things you can 20 establish by context as you're reading the code.</p> <p>21 MR. HEISE: Q. So when you've been talking 22 about fragments, it's eliminating copyright notice, 23 authorship, comments, and definitional portions of that 24 particular file?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 151</p> <p>1 example, if the code is a case statement, where it wants 2 to treat -- where the code is intended to treat a series 3 of values -- you know, let's say it's the digits from 0 4 to 9 -- the author might show the code for digit 0, 5 digit 1, skip all the digits up to 9, and just show the 6 code for digit 9.</p> <p>7 Q. If all of the necessary information appears in 8 these public texts, why would a company like Sequent 9 bother to enter into a license to get what's otherwise 10 publicly available?</p> <p>11 MR. KAO: Objection to form.</p> <p>12 THE WITNESS: First of all, the presumption 13 that all of the code appeared in the text is incorrect. 14 It doesn't.</p> <p>15 MR. HEISE: Q. Was there any part of the code 16 that was necessary that did not appear in the text?</p> <p>17 MR. KAO: Objection to form.</p> <p>18 THE WITNESS: Many parts.</p> <p>19 MR. HEISE: Q. With respect to the read-copy 20 update at Sequent, were you -- were you at Sequent when 21 that technology was written?</p> <p>22 MR. KAO: Objection to form.</p> <p>23 THE WITNESS: I think not.</p> <p>24 MR. HEISE: Q. Do you have any understanding 25 about read-copy update, how it interfaces with a kernel,</p>
<p style="text-align: right;">Page 150</p> <p>1 MR. KAO: Objection to form.</p> <p>2 MR. HEISE: Q. Is there anything else that 3 would be eliminated from these fragments besides actual 4 source code?</p> <p>5 MR. KAO: Objection to form. Are we talking 6 about the context of these books that he's talking 7 about?</p> <p>8 MR. HEISE: He's been talking about these 9 methods and concepts that appear publicly in books.</p> <p>10 MR. KAO: Okay.</p> <p>11 MR. HEISE: And I'm just trying to establish 12 what it is that he believes is in these books and what 13 isn't.</p> <p>14 Q. So you've identified what you've been using 15 the term "fragments" of it appear. And a fragment, at 16 least as I understand it from you, is the source code, 17 taking away the copyright, the authorship, comments, and 18 definitional section.</p> <p>19 Is there anything else that does not appear in 20 these fragments, or are you telling us that if you strip 21 all that, you're left with all the source code that 22 appears in a given file?</p> <p>23 A. Now it will depend upon the example and the 24 author. Sometimes the author will use ellipses, 25 omitting a repetitive section of the code. So, for</p>	<p style="text-align: right;">Page 152</p> <p>1 where it's located, anything like that; or is that, 2 since it was not during your tenure, something that you 3 are not familiar with?</p> <p>4 A. I'm not familiar with.</p> <p>5 Q. Fair enough. How about NUMA, Non-Uniform 6 Memory Access? Were you involved in the authorship or 7 creation of that at Sequent?</p> <p>8 A. In the sense of architecture, yes. In the 9 sense of coding, no.</p> <p>10 Q. In terms of architecture, is it your 11 understanding that this NUMA technology operates inside 12 the kernel?</p> <p>13 A. NUMA implementation appears at many layers. 14 It appears at the hardware layer, requiring some 15 specific behaviors of the cache and the bus. It appears 16 in the operating system that requires some specific 17 behaviors with regard to memory allocation and process 18 dispatch and I/O handling. It appears occasionally in 19 certain kinds of applications, such as database 20 applications, that need to be cognizant of the 21 underlying architecture.</p> <p>22 Q. The NUMA technology, was that in Dynix/ptx?</p> <p>23 A. It was eventually in Dynix/ptx. It wasn't 24 initially in Dynix/ptx.</p> <p>25 Q. Is started in Dynix, is your understanding?</p>

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1 A. That's a harder question. I don't know, is  
 2 the best answer.  
 3 Q. Does NUMA appear in Dynix/ptx?  
 4 A. NUMA support certainly appears in Dynix/ptx.  
 5 Q. Well, when you talked about NUMA appearing at  
 6 various levels, hardware, operating system, at the  
 7 operating system level, does it appear in the kernel?  
 8 A. It will appear principally in the kernel.  
 9 Q. But with the NUMA that appears, I think you  
 10 said, principally in the kernel at the operating system  
 11 level, how does it interface with the existing kernel?  
 12 MR. KAO: Objection to form.  
 13 THE WITNESS: Not clear what your question is.  
 14 MR. HEISE: Q. Does the kernel have to be  
 15 modified in any way to accept the NUMA code or  
 16 technology that's being incorporated?  
 17 MR. KAO: Objection to form.  
 18 THE WITNESS: Yes.  
 19 MR. HEISE: Q. When you talk about -- I think  
 20 you used this word earlier, a code module? Is that my  
 21 making things up, or --  
 22 A. No.  
 23 Q. -- Is that something that you said earlier?  
 24 A. Right.  
 25 Q. Okay. Trying to get an understanding on your

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1 view of what did or did not have to be maintained in  
 2 confidence or could be made public or disposed of,  
 3 et cetera. If -- when you're using the phrase "code  
 4 module," could you tell me what you mean by that? Is  
 5 that an entire file? Is it a part of a file? I'm just  
 6 trying to get a handle on that.  
 7 A. First of all, it would almost certainly be a  
 8 file. It might be multiple files, but it would be at  
 9 least one file.  
 10 And under most circumstances, a module is a  
 11 piece of code that implements a function. It's not  
 12 complete by itself. It has to be bound with other  
 13 functions and bound into the overall operating  
 14 environment, but it would implement a specific function.  
 15 So, for example, malloc, which is the way that  
 16 memory is allocated in the Unix operating environment,  
 17 is a module that appears in lots of Unixes; but the  
 18 implementation of malloc, which is give me a piece of  
 19 virtual memory, will make some calls on lower-level  
 20 system services that will actually do the allocation of  
 21 physical memory, the backing store -- meaning the disk  
 22 that keeps the physical memory when it's not in the main  
 23 memory -- allocate page table entries, potentially makes  
 24 notice to -- of the kind of usage of the memory  
 25 allocation. If it's for I/O, it's special. And that

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1 part of the module could be completely different from  
 2 one Unix to the next.  
 3 So if you looked at it from the top, they all  
 4 look like malloc. If you look at it from the bottom,  
 5 they all look different.  
 6 Q. So using memory allocation as an example of a  
 7 code module, was that memory allocation from Unix  
 8 System V incorporated into Dynix/ptx, to your knowledge?  
 9 A. I don't know, is the accurate statement. My  
 10 guess is not.  
 11 Q. Okay. Can you identify for us a code module  
 12 that was used in Dynix/ptx?  
 13 MR. KAO: Objection to form.  
 14 THE WITNESS: Not specifically.  
 15 MR. HEISE: Q. Well, then let's talk about  
 16 code module X.  
 17 A. Okay.  
 18 Q. If we have code module X that is put into  
 19 Dynix/ptx, what is your understanding as to what Dynix  
 20 can do with code module X that came from Unix System V?  
 21 MR. KAO: Objection to form.  
 22 THE WITNESS: Okay. Whatever the module might  
 23 be, it will have some application programming interface;  
 24 it will have some exposed symbol, which is the way in  
 25 which it's called; and it'll have some parameters, in

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1 most cases, that are specified in the documentation.  
 2 MR. HEISE: Q. So if code module X is  
 3 incorporated into Dynix/ptx from System V, is it true  
 4 that it contains then Unix System V code in that module?  
 5 MR. KAO: Objection to form.  
 6 THE WITNESS: It's possible.  
 7 MR. HEISE: Q. Okay.  
 8 A. It's not required.  
 9 Q. Okay. So just by way of example, then, if we  
 10 did have code module X that has Unix System V source  
 11 code in it and that is put into Dynix, is it your  
 12 understanding that the Unix System V code that appears  
 13 in that code module X must be maintained in confidence?  
 14 A. Yes, if it were copied from the System V  
 15 source.  
 16 Q. What if the -- in the process of taking the  
 17 Unix System V code module X and putting it into Dynix,  
 18 would that require that additional lines of code be  
 19 written so that it would function with the Dynix/ptx  
 20 system?  
 21 A. Quite likely.  
 22 Q. Okay. That's what I assumed, but I just  
 23 wanted to be sure.  
 24 A. And just by completeness, if it's a module  
 25 that doesn't make sense in the Dynix/ptx context, you

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1 might subtract lines of code. That is, it might simply  
2 return successful.

3 Q. Okay. In that situation where, however, you  
4 have to add lines of code to this code module X so that  
5 it functions properly with Dynix/ptx, what is your  
6 understanding as to what Sequent's obligations are to  
7 maintain in confidence the source code? In the example  
8 I just gave you, you've got source code that Sequent  
9 wrote so that it would work, and then you've got the  
10 original Unix System V source code that appears in code  
11 module X.

12 A. Right. On the presumption that it's a single  
13 file, if it were a mix of Unix System V code and  
14 Sequent-authored code, most likely the entirety would be  
15 held in confidence because it would be hard to expose  
16 only the changed lines.

17 Q. Okay. What about if, after going through  
18 numerous changes because of programmers dealing with it  
19 through Version 1 to Version 2, the Unix System V code  
20 lines don't appear as they did in Unix System V? What,  
21 if anything, is Sequent obligated to do now with that  
22 code module X?

23 MR. KAO: Objection to form.

24 THE WITNESS: In my reasoning, if the function  
25 X is now performed in some other way, including the null

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1 way, then it ceases to have any System V content and  
2 it's disclosable at the choice of Sequent, of course.

3 MR. HEISE: Q. So if the lines get rewritten  
4 so that they no longer appear as they were in Unix  
5 System V, at that point Sequent is no longer obligated  
6 to maintain it in confidence?

7 A. Now it's on a fine point. That is, you know,  
8 did you just change A to B? I wouldn't consider that to  
9 be a sufficient difference. If the module was rewritten  
10 to implement the function with a new algorithm and there  
11 were no lines of the original code, then I would say  
12 yes.

13 Q. Even though it's performing the same function  
14 as originally?

15 A. Right. The functions are specified by the  
16 operating system interface.

17 Q. Do you make any distinction in this example as  
18 to whether we're taking about C code versus header file  
19 code?

20 MR. KAO: Objection to form.

21 THE WITNESS: Yes. I mean, again, you can  
22 have the same either huge difference or small difference  
23 as the possibility. But because header files generally  
24 have to be exposed in order to allow use, they're  
25 treated differently.

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1 MR. HEISE: Q. If there was a code module  
2 that -- let's call it code module Y, that contains  
3 structures and sequences and organization as it appears  
4 in System V, is that, according to your understanding of  
5 the software agreement, restricted in any manner?

6 MR. KAO: Objection to form.

7 THE WITNESS: It would depend. If the reason  
8 for the similarity were essentially that there wasn't  
9 any other way to do it, then it would hinge on who  
10 authored it and when. If the reason the similarity was  
11 there was because it was just copied, then yeah, I would  
12 agree that that would be subject to the constraints.

13 MR. HEISE: Q. So if you have code module Y  
14 that has structure, sequence, and organization that came  
15 from Unix System V and it's not the only way to do  
16 something, your understanding is that that would be  
17 restricted and would have to be maintained in  
18 confidence; is that correct?

19 MR. KAO: Objection to form.

20 THE WITNESS: Yes.

21 MR. HEISE: Q. What if over time that same  
22 code module Y that contained the structure, sequence,  
23 and organization from System V was rewritten so many  
24 times between Version 1 and Version 2 that came out from  
25 Sequent so that it no longer followed that original Unix

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1 System V structure, sequence, and organization? Would  
2 you consider that something that also had to be  
3 maintained in confidence, or could that be provided  
4 publicly?

5 MR. KAO: Objection to form.

6 THE WITNESS: Generally, no.

7 MR. HEISE: Q. No, it would not need to be  
8 maintained --

9 A. Would not need to be maintained.

10 Q. -- in confidence?

11 No, it would not need to be maintained in  
12 confidence?

13 A. Yes. Or yes to a no.

14 Q. Yes, I am correct that would not need to be  
15 maintained in confidence, according to you?

16 A. Yes.

17 (Mr. James joins the proceedings.)

18 MR. HEISE: Q. Are you aware of any  
19 publications that provided source code for Unix System  
20 V, Release 4.0?

21 A. I have no awareness.

22 Q. Well, you had mentioned earlier -- I need to  
23 maybe look at my notes -- that you had -- you had a  
24 book -- I think it was the Unix System Primer.

25 A. Mm-hmm.



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1 Q. Is that the one that you said you had in your  
2 possession?  
3 A. Yes.  
4 Q. -- that identified Unix.  
5 So, first, is this -- when you talk about  
6 that, are you talking about identifying fragments in  
7 Unix?  
8 A. Yes.  
9 Q. Do you know whether that Unix System Primer  
10 was identifying source code from Unix System V,  
11 Release 4.0?  
12 A. I don't know. I don't think so because it  
13 appeared much earlier than System V, Release 4.  
14 Q. When is the book that you're talking about,  
15 this Unix System Primer?  
16 A. Oh, 1983.  
17 Q. Were there ever times in which Sequent or AT&T  
18 did address specific terms of the license in writing?  
19 MR. KAO: Objection to form.  
20 THE WITNESS: I'm not clear what the question,  
21 is.  
22 MR. HEISE: Okay. I'll be glad to try and  
23 rephrase it.  
24 Q. We've talked at length about certain issues  
25 that you said you discussed and learned the intent of

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1 AT&T; for example, definition of "software product" or  
2 what needed to be maintained in confidence, whether it  
3 was methods or concepts. And all those were oral,  
4 nothing in writing; is that correct?  
5 A. That's correct.  
6 Q. So my question is: Were there ever times when  
7 something was put in writing about any aspect of the  
8 contractual relationship between Sequent and AT&T,  
9 either from AT&T or from Sequent?  
10 MR. KAO: Objection to form.  
11 THE WITNESS: Yes. Again, I don't have a  
12 recollection of the date; but at some later time, AT&T  
13 contracted with Sequent to do development work which  
14 required disclosure of the Dynix source code to AT&T.  
15 And so there was a document about that time.  
16 MR. HEISE: Q. Okay. How about with respect  
17 to the Unix System V code? So I understand your example  
18 was with respect to the Dynix code.  
19 A. Mm-hmm.  
20 Q. So with respect to the Unix System V code that  
21 was licensed from AT&T, was there ever anything in  
22 writing between AT&T and Sequent pertaining to this  
23 Exhibit 1 to Exhibit 100?  
24 A. Not to my knowledge.  
25 MR. HEISE: Let me hand you a couple of

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1 documents and just see if this refreshes your  
2 recollection at all.  
3 One, I only have one copy of, so we'll mark  
4 that as 101. And the other I do have copies for the  
5 whole gang, which we'll mark as 102.  
6 And you can just put the sticker over it.  
7 THE WITNESS: Thank you.  
8 (Whereupon, Deposition Exhibits 101 and 102  
9 were marked for identification.)  
10 MR. KAO: I guess we should give that to her  
11 first.  
12 So this one is 102?  
13 MR. HEISE: Yes.  
14 MR. KAO: Okay.  
15 MR. HEISE: And this is going to be 103,  
16 which -- oh, that's your copy.  
17 (Whereupon, Deposition Exhibit 103 was marked  
18 for identification.)  
19 MR. HEISE: And 101 is the sole copy. I  
20 apologize for that.  
21 MR. KAO: You want to start with 101?  
22 MR. HEISE: Yes, but I'm going to have to ask  
23 you to give it back to me since, as I mentioned, it was  
24 the only copy and it's not stapled and all sorts of  
25 other maladies.

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1 Q. This document makes reference to an April 1983  
2 software agreement as modified, and it's regarding  
3 Release 2.0.  
4 A. Okay.  
5 Q. And it appears to have a signature for Otis  
6 Wilson and for yourself, talking about various terms of  
7 that earlier 1983 agreement.  
8 A. Okay.  
9 Q. Is that how changes would be communicated  
10 between Sequent and AT&T pertaining to the agreement,  
11 whether it's the earlier version of the 1983 or these  
12 1985 agreements that are attached to your Exhibit 100  
13 declaration?  
14 A. That's what I --  
15 MR. KAO: I object to form. And could I just  
16 have a chance to look at the document --  
17 MR. HEISE: Here you go. Absolutely.  
18 MR. KAO: -- along with the witness --  
19 MR. HEISE: Yeah.  
20 MR. KAO: -- before we ask questions about it,  
21 since we don't have a copy?  
22 MR. HEISE: Q. Are you done?  
23 A. Yes.  
24 Q. Have you had to time to look at it? Because  
25 I'm not really asking you substantively about the

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<p style="text-align: right;">Page 165</p> <p>1 contents of the document as much as I am about trying to</p> <p>2 understand the way in which Sequent and AT&amp;T would</p> <p>3 operate when there were anything that needed to be</p> <p>4 addressed regarding the agreements.</p> <p>5 This one, obviously, Exhibit 101, references</p> <p>6 an earlier agreement between AT&amp;T --</p> <p>7 A. Right.</p> <p>8 Q. -- and Sequent.</p> <p>9 Were you involved in the negotiation or</p> <p>10 execution of the earlier agreement, the 1983 --</p> <p>11 A. Yes.</p> <p>12 Q. -- that's referenced?</p> <p>13 A. I'm presuming that we're talking about --</p> <p>14 Q. Well, this references a 1983 agreement, and</p> <p>15 that's why -- I'm just trying to get clarification on</p> <p>16 that first.</p> <p>17 A. I have no recollection of that.</p> <p>18 Q. Okay. Then going back to my original</p> <p>19 question, is this your understanding as to how AT&amp;T and</p> <p>20 Sequent would operate when they were addressing terms in</p> <p>21 the documents; namely, there would be this</p> <p>22 correspondence from AT&amp;T and then you or someone at</p> <p>23 Sequent would sign and return the document?</p> <p>24 MR. KAO: Objection to form.</p> <p>25 THE WITNESS: I presume so. I mean, I don't</p>	<p style="text-align: right;">Page 167</p> <p>1 appears on the document?</p> <p>2 A. It is my signature.</p> <p>3 Q. And again, was this the procedure that would</p> <p>4 be followed to identify any issues between AT&amp;T</p> <p>5 regarding the software agreement; namely, a letter from</p> <p>6 AT&amp;T that would be countersigned by you?</p> <p>7 MR. KAO: Objection to form.</p> <p>8 THE WITNESS: Actually, this exhibit gives me</p> <p>9 one other piece of recollection, which is that it was</p> <p>10 Ira Kistenberg who was on the phone calls most of the</p> <p>11 time.</p> <p>12 MR. HEISE: Q. Is Mr. -- could you spell the</p> <p>13 last name?</p> <p>14 A. K-i-s-t-e-n-b-e-r-g.</p> <p>15 Q. You're reading his name off the --</p> <p>16 A. Off the --</p> <p>17 Q. -- bottom of the document?</p> <p>18 A. Off the document.</p> <p>19 Q. So he was the AT&amp;T person --</p> <p>20 A. Right.</p> <p>21 Q. -- who was on the phone calls?</p> <p>22 A. So, but to answer your question, this would be</p> <p>23 the form that we would take when we asked for something</p> <p>24 additional.</p> <p>25 Q. Okay. And what about Exhibit 103?</p>
<p style="text-align: right;">Page 166</p> <p>1 have a recollection. I'm trying to remember now. I</p> <p>2 don't think I joined Sequent until July of 1983. So</p> <p>3 this -- the agreement that's referred to here would have</p> <p>4 been executed by somebody else.</p> <p>5 MR. HEISE: Q. Okay.</p> <p>6 A. And with regard to is this how we would</p> <p>7 exchange notes, I think we probably would have</p> <p>8 exchanged -- when we requested something different, we</p> <p>9 probably would have phoned them, said "How do you want</p> <p>10 to deal with this?"</p> <p>11 Q. And after a phone call was made, it would be</p> <p>12 memorialized in a letter and then you would sign it and</p> <p>13 return it back to AT&amp;T? Was that the procedure?</p> <p>14 MR. KAO: Objection to form.</p> <p>15 THE WITNESS: I don't recall that as an</p> <p>16 ongoing process.</p> <p>17 MR. HEISE: Q. Well, if you could, sir,</p> <p>18 turning your attention to Exhibit 102, which does make</p> <p>19 reference to Exhibit 1 of your declaration, the software</p> <p>20 agreement.</p> <p>21 A. Right.</p> <p>22 Q. Apparently somebody at Sequent had asked for a</p> <p>23 particular copy of a book.</p> <p>24 A. Right.</p> <p>25 Q. And then, again, is that your signature that</p>	<p style="text-align: right;">Page 168</p> <p>1 THE WITNESS: Do you have this one?</p> <p>2 MR. KAO: Yeah.</p> <p>3 MR. HEISE: Q. Is that your signature that</p> <p>4 appears on 103?</p> <p>5 A. Yes, it is.</p> <p>6 Q. While you're taking the time to review it, my</p> <p>7 question is: When terms were changed or clarified or</p> <p>8 discussed, is this the procedure that would be followed:</p> <p>9 AT&amp;T would provide you with correspondence and you would</p> <p>10 countersign it and return it?</p> <p>11 A. That would certainly --</p> <p>12 MR. KAO: Object to form.</p> <p>13 THE WITNESS: That would certainly be the case</p> <p>14 with regard to correspondence.</p> <p>15 Okay.</p> <p>16 MR. HEISE: Q. You've had the opportunity</p> <p>17 to --</p> <p>18 A. I did read it, yes.</p> <p>19 Q. -- review this?</p> <p>20 Having had the opportunity to review</p> <p>21 Exhibits 101, 102, and 103, just to make sure I covered</p> <p>22 it for all three, it does have your signature on each of</p> <p>23 these exhibits; is that correct?</p> <p>24 A. It is mine.</p> <p>25 Q. And with respect to 103, this was a -- this</p>

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<p style="text-align: right;">Page 169</p> <p>1 was correspondence regarding the sublicensing a greement,  2 meaning the one for the binary --  3 A. That's correct.  4 Q. -- code?  5 And was this an example of how terms would be  6 discussed or clarified when AT&amp;T and Sequent concluded  7 that something needed to be clarified?  8 MR. KAO: Objection to form.  9 THE WITNESS: In this particular case, I  10 believe that this was a general -- a general change in  11 terms that was not initiated by Sequent. There was  12 nothing new requested by Sequent. They obviously had  13 somebody whose behavior they didn't like and they wanted  14 to clarify.  15 MR. HEISE: Q. And Sequent agreed to it by  16 indicating --  17 A. By acknowledging the letter.  18 Q. -- by indicating and countersigning the  19 document and returning it to AT&amp;T; is that correct?  20 A. Yes, we did.  21 Q. Having had the opportunity to review  22 Exhibits 101, 102, and 103, does this refresh your  23 recollection at all as to written correspondence being  24 the manner in which changes or clarifications to the  25 various agreements would occur; namely, they would be</p>	<p style="text-align: right;">Page 171</p> <p>1 provided by you?  2 A. The example was mine.  3 Q. Did you provide any other examples that do not  4 appear in your declaration?  5 MR. KAO: To -- let me -- let me ask. Are you  6 asking did he provide other examples in discussions with  7 counsel, or did he provide other examples in the  8 declaration, which I think speaks for itself?  9 MR. HEISE: I will clarify.  10 Q. Prior to orally agreeing to have Cravath,  11 Swaine &amp; Moore, IBM's lawyers, represent you, did you  12 have any discussions with them about other examples from  13 you, not from them, of instances that would meet the  14 definition of, quote, available without restriction to  15 the general public?  16 A. I don't have a specific recollection. In  17 recollecting the conversation, I explicitly remember  18 mentioning books, and I probably -- this is  19 speculation -- I probably would have mentioned public  20 speaking engagements by AT&amp;T personnel.  21 Q. Backtracking for just one second, but you just  22 brought it up a few minutes ago and it jogged my memory,  23 you talked about this situation where Dynix code was  24 revealed to AT&amp;T. Was that pursuant to a written  25 agreement?</p>
<p style="text-align: right;">Page 170</p> <p>1 done in writing and countersigned by Sequent or somebody  2 at Sequent?  3 MR. KAO: Objection to form.  4 THE WITNESS: If there was a material change,  5 if it was an increment of rights or content.  6 MR. HEISE: Q. Continuing on, sir, with your  7 declaration, in paragraph 14, again, you start a  8 sentence with "As I understood the agreement . . ."  9 Is that from your reading of the agreement or  10 from any other basis?  11 A. It's based on having read the agreement,  12 having had the conversations with the parties.  13 Q. And then in paragraph 15, we touched on this  14 before, about the phrase from Section 7.06 of "available  15 without restriction to the general public" not having a  16 particular definition or example attached to it. Do you  17 recall that?  18 A. Yes.  19 Q. You indicate in your declaration under oath  20 that you believe there are a number of circumstances  21 that would meet the definition of "available without  22 restriction to the general public"?  23 A. Yes, I do.  24 Q. The example that's provided here, was that  25 provided by the lawyers or is that an example that was</p>	<p style="text-align: right;">Page 172</p> <p>1 A. Yes, it was.  2 Q. When's the last time that you looked at that  3 agreement?  4 A. I don't think I ever looked at that agreement.  5 Q. Okay. I guess I assumed something that did  6 not occur.  7 How is it that you became aware of the terms  8 of that agreement between AT&amp;T and IBM for AT&amp;T to  9 review the Dynix code?  10 MR. JAMES: AT&amp;T and Sequent?  11 MR. KAO: Objection to form.  12 MR. JAMES: You said "AT&amp;T and IBM."  13 MR. HEISE: Thank you. I will go ahead and  14 start that one over.  15 Q. How is it you became aware of any of the terms  16 between AT&amp;T and Sequent for AT&amp;T to view the Dynix  17 code?  18 A. Again, no specific recollection. The likely  19 occurrence was that Michael Simon spoke at an executive  20 staff meeting about the agreement with AT&amp;T, and my part  21 in that would be to execute on the fulfillment.  22 Q. Okay. Are you aware of any books, going back  23 to your paragraph 15, that provide source code from Unix  24 System V in greater than a fragment?  25 A. I personally am unaware of them. It would not</p>

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<p style="text-align: right;">Page 173</p> <p>1 be shocking to me that there are texts in use at 2 universities.</p> <p>3 Q. Do you have any understanding, sir, as to the 4 confidentiality obligations of universities that have 5 Unix System V?</p> <p>6 A. No, I do not.</p> <p>7 Q. Do you know one way or the other whether 8 universities, its employees, and students are obligated 9 to maintain in confidence Unix System V and all the 10 other items identified in the agreements between AT&amp;T 11 and the universities?</p> <p>12 A. I don't know that.</p> <p>13 Q. You indicated that another possible example of 14 situations where something would become available 15 without restriction to the general public would occur 16 because of speaking engagements.</p> <p>17 A. Yes.</p> <p>18 Q. Could you tell us what you're referring to 19 there?</p> <p>20 A. There, as there are in many industries, 21 industry gatherings, industry events where technical 22 people will give talks on how a particular problem was 23 solved or how a particular marketplace need was 24 addressed. And it was very frequently the case that a 25 developer from AT&amp;T or other company would stand up and</p>	<p style="text-align: right;">Page 175</p> <p>1 MR. HEISE: Thank you, sir.</p> <p>2 THE VIDEOGRAPHER: Going off the record. The 3 time is 1:50. 4 (Recess taken.)</p> <p>5 THE VIDEOGRAPHER: We're back on the record. 6 The time is 2:11.</p> <p>7 MR. HEISE: Q. Sir, I just have a few quick 8 areas I just want to touch base on.</p> <p>9 When you gave us your employment history from 10 Carnegie-Mellon all the way through IP Unity, were there 11 any breaks between times when you, for example, went 12 from Digital to Sequent or Sequent to Compaq that are 13 not covered?</p> <p>14 A. The only break in my employment was after I 15 left Brightlink and before I started at IP Unity.</p> <p>16 Q. What did you do during that time?</p> <p>17 A. I took the summer off and looked for a job.</p> <p>18 Q. Okay. Because Brightlink decided it was time 19 to go belly-up?</p> <p>20 A. Yep.</p> <p>21 Q. All right. What was the reason that you left 22 Sequent?</p> <p>23 A. Essentially, because Sequent was no longer 24 sort of at the forefront of enterprise application 25 innovation.</p>
<p style="text-align: right;">Page 174</p> <p>1 talk about how they did something really cool.</p> <p>2 Q. In these discussions, would they provide the 3 entire source code for that particular item that they 4 may have been discussing?</p> <p>5 A. It's not likely, because in a public speaking 6 event, you're limited as to time and you're not likely 7 to go through it line by line. However, you'll -- in 8 such a case, you'll usually provide the key block 9 diagram of how the module's put together and then some 10 of the key code fragments to say, "Here's how this 11 problem was solved."</p> <p>12 Q. In your experience, did you ever see -- did 13 you ever attend any speaking functions where AT&amp;T 14 personnel talked about source code?</p> <p>15 A. I'm sure I did. I don't remember a specific 16 incident.</p> <p>17 Q. Do you recall any instance in which more than 18 just source code fragments were ever revealed at any of 19 the engagements that you attended?</p> <p>20 A. No, I can't imagine that.</p> <p>21 MR. HEISE: If we could just take a short 22 break and I'll check my notes, and --</p> <p>23 THE WITNESS: Sure.</p> <p>24 MR. HEISE: -- we might get you out of here.</p> <p>25 THE WITNESS: Awesome.</p>	<p style="text-align: right;">Page 176</p> <p>1 The context here is that my expertise over 2 time at Sequent had become IT oriented. My stint as the 3 CIO and as the professional services guy gave me a lot 4 of insight into how businesses were using open systems 5 technology and enterprise scale applications like SAP 6 and Oracle. And at that point in time, Compaq was 7 making a big push to partner with those application 8 providers and to use the Windows NT platform as a 9 vehicle to kind of crash the cost of enterprise 10 computing, and that seemed like an innovative thing to 11 do.</p> <p>12 Q. Okay. What about this Roger Swanson? Do you 13 know why he left Sequent?</p> <p>14 A. I don't. In fact, I don't even know when he 15 left Sequent.</p> <p>16 Q. Okay. How is it that you believe he's in 17 Beaverton or Portland, Oregon, area?</p> <p>18 A. I think I maintain sort of peripheral contact 19 with ex-Sequent employees through an Internet mail group 20 called Ex-Sequent, and I've seen Roger appear there in 21 some postings.</p> <p>22 Q. Got it. Then the last thing I just wanted to 23 ask you about, and I meant to earlier, is in paragraph 5 24 of your declaration.</p> <p>25 A. Okay.</p>



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1 Q. Specifically what I'm not understanding is, in  
2 your declaration you state:  
3 "Although I did not personally negotiate the  
4 Sequent Agreements with representatives of  
5 AT&T . . . I carefully reviewed the  
6 agreements myself with other Sequent  
7 employees before executing them . . . ."  
8 And then you continue on.  
9 A. Yes.  
10 Q. In reading this, it doesn't indicate anywhere  
11 in here that you talked with AT&T personnel. Because  
12 you specifically state that you did not personally  
13 negotiate the Sequent agreements with AT&T personnel.  
14 Is that just an inaccurate statement as it  
15 appears in No. 5?  
16 MR. KAO: Objection to form.  
17 THE WITNESS: I certainly did make contact  
18 with AT&T personnel during this process. And the intent  
19 of this statement was just to say that I didn't  
20 participate in the drafting; I did participate in the  
21 review.  
22 MR. HEISE: I don't have anything further at  
23 this time.  
24 You may or may not be aware that we were in  
25 court earlier this week about your deposition, and for

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1 the reasons that were stated at length there, we're  
2 going to reserve the right to come back when we get  
3 additional documentation. But for today, I very much  
4 appreciate the time that you've given us, sir.  
5 THE WITNESS: Thank you.  
6 MR. KAO: I just have a few questions that  
7 I'll go through with you. But --  
8 THE WITNESS: Okay.  
9 MR. KAO: -- although I may be sitting over  
10 here, you can pretend like I'm sitting in Mark's seat.  
11 MR. HEISE: Exactly. I'll be the puppet  
12 master.  
13 FURTHER EXAMINATION BY MR. KAO  
14 MR. KAO: Q. The first question I had was:  
15 With respect to Dynix/ptx, are you aware of what  
16 third-party code, apart from code written by Sequent, is  
17 in Dynix/ptx?  
18 A. I don't have specific knowledge. I can say  
19 that there are pieces of third-party code in Dynix/ptx,  
20 one element of which was written by Oracle. And there  
21 are others, but I don't know them specifically.  
22 Q. Based on your understanding of the licensing  
23 agreement, would AT&T have the right to control in any  
24 way Sequent's use or disclosure or distribution of that  
25 third-party code in Dynix?

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1 MR. HEISE: Objection to form.  
2 You may answer.  
3 MR. KAO: Q. Dynix/ptx, I should say.  
4 A. I would hope not. That's certainly not my  
5 interpretation of the licensing agreement.  
6 Q. In your telephone discussions with  
7 representatives of AT&T, did you believe that the --  
8 well, strike that.  
9 Let me ask it this way: When you were having  
10 phone discussions with AT&T about the Unix System V  
11 license that you were entering into, did you have  
12 discussions regarding changes that Sequent wanted to  
13 make to the agreement?  
14 MR. HEISE: Objection to form.  
15 You may answer.  
16 THE WITNESS: No. It was just trying to  
17 clarify what was the intent of the language and how they  
18 were going to enforce it.  
19 MR. KAO: Q. Did you yourself feel any need  
20 to document in writing your discussions with AT&T  
21 Technologies regarding the license agreement?  
22 A. I did not.  
23 Q. And why is that?  
24 A. Perhaps naively, I took them at their word.  
25 Q. Do you know if anyone on your staff at Sequent

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1 attempted to document discussions with AT&T?  
2 A. It's possible, but not to my knowledge.  
3 Q. Now, if you can look at the software agreement  
4 again with me, when Mr. Heise was questioning you, you  
5 looked at Section 1.04 --  
6 A. Yes.  
7 Q. -- of the agreement. Do you remember that?  
8 A. Yes.  
9 Q. And I believe you testified that that -- at  
10 the time that you executed this agreement, you believed  
11 that that particular section was vague. Do you remember  
12 that testimony?  
13 A. Yes, I do.  
14 Q. Can you explain to me in what sense you  
15 believe this section to be vague?  
16 MR. HEISE: Objection.  
17 You may answer.  
18 THE WITNESS: Okay. The description of  
19 computer programs and documentation, the capture in that  
20 language is too broad to be practical. As we've  
21 discussed previously, the essence of Unix requires that  
22 some of the source be exposed and modifiable by the  
23 customers. Certainly the documentation has to be  
24 exposed to customers. And so it's just overbroad.  
25 MR. KAO: Q. Did you have -- do you recall

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<p style="text-align: right;">Page 181</p> <p>1 specific discussions you had with AT&amp;T Technologies  2 regarding this Section 1.04?  3 A. I don't have a specific recollection, only  4 clarifying that their intent was not to make the source  5 code unusable.  6 Q. In other words, you don't remember the exact  7 words they told you?  8 A. That's correct.  9 Q. But you do remember discussions where you  10 talked about this section?  11 A. Right.  12 MR. HEISE: Objection.  13 THE WITNESS: We clarified the intent.  14 MR. HEISE: Objection to form.  15 I know she doesn't want two of us speaking at  16 the same time. She definitely doesn't want three of us  17 speaking at the same time.  18 MR. KAO: Q. Let me ask it this way: Can you  19 just tell me what discussions you remember having with  20 AT&amp;T generally about this Section 1.04?  21 MR. HEISE: Objection.  22 You may answer.  23 THE WITNESS: Only that the intended  24 interpretation of this paragraph was not to restrict our  25 ability to create the derivative work or to sell a</p>	<p style="text-align: right;">Page 183</p> <p>1 MR. HEISE: Objection.  2 You may answer.  3 THE WITNESS: Sorry.  4 MR. KAO: Q. Did you have any discussions  5 with AT&amp;T regarding whether AT&amp;T considered the software  6 product to include source code that Sequent developed on  7 its own?  8 MR. HEISE: Objection.  9 You may answer.  10 THE WITNESS: I don't recall a specific  11 conversation.  12 MR. KAO: Q. Do you recall general  13 discussions?  14 MR. HEISE: Same objection.  15 THE WITNESS: No, I don't recall a specific  16 conversation. I recall being satisfied that our -- we  17 were not bargaining away the rights to our intellectual  18 property.  19 MR. KAO: Q. And how did you become satisfied  20 with that?  21 A. Through a verbal assurance from someone at  22 AT&amp;T.  23 Q. Now, in response to questions from Mr. Heise,  24 I believe you testified that Sequent attempted to  25 maintain the Dynix/ptx source code confidential. Is</p>
<p style="text-align: right;">Page 182</p> <p>1 usable product.  2 MR. KAO: Q. Can you explain what you mean by  3 that?  4 A. That those things which are necessary to be  5 exposed to make use of the resulting Dynix/ptx or Dynix  6 would be within the interpretation of this paragraph.  7 Q. I'm not sure I'm understanding your answer.  8 What materials did you understand AT&amp;T to  9 consider part of the software product?  10 MR. HEISE: Objection.  11 You may answer.  12 THE WITNESS: The language is inclusive of  13 object code, source code, and documentation. We  14 clarified with AT&amp;T that that would not be construed to  15 limit our ability to expose those pieces of source code  16 that were necessary for customization or those pieces of  17 documentation that were necessary for use.  18 MR. KAO: Q. And I think in -- when you were  19 discussing this issue with Mr. Heise, the source code  20 that you were referring to were header files?  21 A. Among them, yes.  22 Q. Now, did you understand this Section 1.04 to  23 include, as part of the software product, any materials  24 or any source code developed by Sequent on its own?  25 A. I did not.</p>	<p style="text-align: right;">Page 184</p> <p>1 that correct?  2 A. That's correct.  3 Q. As you understand the license agreements with  4 AT&amp;T for Unix System V, did Sequent attempt to maintain  5 the Dynix/ptx source code confidential because it was  6 obligated to under the agreement or because it chose to  7 do so as a matter of business practice?  8 MR. HEISE: Objection.  9 You may answer.  10 THE WITNESS: Both of those.  11 MR. KAO: Q. Can you explain what you mean by  12 that?  13 A. Yes. Certainly, the Dynix/ptx source code  14 that was derived from AT&amp;T was required to be maintained  15 in confidentiality; and for that matter, any third-party  16 contributions that were similarly covered would have had  17 to be maintained in confidentiality.  18 And then in my view, Sequent was free to do  19 what it would with its own source code; but as I  20 explained earlier, we had, at least for the time, a  21 competitive advantage in performance and stability that  22 we wanted to maintain as a trade secret.  23 Q. Did Sequent maintain its Dynix/ptx source code  24 confidential from AT&amp;T Technologies?  25 A. It did.</p>

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1 MR. HEISE: Objection.  
 2 You may answer.  
 3 MR. KAO: Q. If AT&T requested the Dynix/ptx  
 4 source code, would you have provided -- would Sequent  
 5 have provided that source code to AT&T without a license  
 6 from Sequent?  
 7 MR. HEISE: Objection.  
 8 You may answer.  
 9 THE WITNESS: With an appropriate  
 10 nondisclosure document or a license.  
 11 MR. KAO: Q. Did you understand the license  
 12 agreement that you entered into with AT&T for Unix  
 13 System V to give AT&T the right to obtain the source  
 14 code that Sequent developed on its own without any  
 15 license agreement from Sequent?  
 16 MR. HEISE: Objection.  
 17 You may answer.  
 18 THE WITNESS: No.  
 19 MR. KAO: Q. Now, in response to a question  
 20 from Mr. Heise, you stated that you believed that  
 21 Dynix/ptx was a derivative work of Unix System V. Do  
 22 you remember that testimony?  
 23 A. Yes.  
 24 Q. Can you tell me what you base that answer on?  
 25 A. Dynix/ptx, because it was -- it had a System V

1 The Non-Uniform Memory Access refers to the  
 2 speed of access for memory that's attached directly to a  
 3 particular processor being faster than memory that's  
 4 attached to another processor in the cluster. It's a  
 5 technology that existed a long time before and  
 6 independent of Unix or any other operating system.  
 7 Q. Do you understand the NUMA technology that  
 8 Sequent developed for Dynix/ptx to be based on any code  
 9 contained in Unix System V?  
 10 MR. HEISE: Objection.  
 11 You may answer.  
 12 THE WITNESS: It's almost certainly not based  
 13 on Unix System V code.  
 14 MR. KAO: Q. And why is that?  
 15 A. There's no contemplation of inhomogeneous  
 16 memory access or distributed memory in Unix System V.  
 17 Q. Are there any methods or concepts within Unix  
 18 System V upon which the NUMA technology that Sequent  
 19 developed for Dynix/ptx are based on?  
 20 A. There are certainly related concepts in Unix  
 21 System V. We mentioned earlier interprocess  
 22 communication. That is a concept that's useful  
 23 independent of Non-Uniform Memory Access. But  
 24 certainly, an application that wants to take advantage  
 25 of a NUMA machine will lean more heavily on it because

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1 personality, would be required to contain, at the very  
 2 least, the utilities that are a part of Unix System V  
 3 that are not a part of the Berkeley Standard  
 4 Distribution.  
 5 Q. Do you know if Dynix/ptx today still contains  
 6 that Unix System V code?  
 7 A. I don't know it from personal knowledge. I  
 8 would make that assumption.  
 9 Q. During the time that you were at Sequent, did  
 10 you know, based on personal knowledge, that there was  
 11 any Unix System V code contained in Dynix/ptx?  
 12 MR. HEISE: Objection.  
 13 You may answer.  
 14 THE WITNESS: I did not inspect the code to  
 15 know that to be true.  
 16 MR. KAO: Q. Do you recall discussing with  
 17 Mr. Heise the NUMA technology earlier?  
 18 A. Yes.  
 19 Q. Can you explain for me what the NUMA  
 20 technology is?  
 21 A. NUMA is an acronym for Non-Uniform Memory  
 22 Access, and it's a way of constructing multiprocessor,  
 23 multimemory computer systems that give the appearance of  
 24 having a single shared memory, but the physical  
 25 realization is multiple distributed memories.

1 it's oriented toward communication that doesn't depend  
 2 on memory speed of access.  
 3 Q. I guess I don't -- I mean, I may be lost in  
 4 the technology. Is the NUMA technology based on those  
 5 methods or concepts within Unix System V?  
 6 A. No, it is not. I'll give you a little bit  
 7 more.  
 8 We talked earlier about different programs  
 9 wanting to make access to a common resource. It doesn't  
 10 matter what that resource is.  
 11 In a shared memory architecture, you can  
 12 utilize a relatively inefficient synchronization  
 13 technique called a spin lock, where all the processes  
 14 that want to access the resource keep looking at a  
 15 common memory location and waiting for their number to  
 16 come up essentially.  
 17 In a Non-Uniform Memory Access machine, that  
 18 would be very inefficient, because except for the  
 19 processor that happened to be close to the memory  
 20 location that was being referenced, all the other  
 21 processors would have to be using some expensive access  
 22 mechanism to look at that memory location.  
 23 So in a NUMA architecture, it's more efficient  
 24 to use interprocess communication, which is more of a  
 25 wake-me-when-it's-my-turn mechanism rather than a

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<p style="text-align: right;">Page 189</p> <p>1 I'll-keep-waiting-until-I-see-it's-my-turn mechanism.  2 Q. And is the interprocess communication concept  3 something unique to Unix System V?  4 A. No, not at all.  5 MR. HEISE: Objection.  6 You may answer, which you already did.  7 MR. KAO: Q. Is that a method or concept that  8 is used by Unix System V?  9 A. Yes, it is.  10 MR. HEISE: Same objection.  11 THE WITNESS: Yeah.  12 MR. KAO: Q. Do you know what the origin of  13 that concept is from?  14 A. I don't know from own knowledge. It's lost in  15 the history of computer science.  16 Q. Now, you looked at Section 7.06(a) of this  17 agreement with Mr. Heise earlier, and I just want to ask  18 you some questions about that. And in particular, I  19 think you looked at the first sentence, which says that:  20 "LICENSEE agrees that it shall hold all parts  21 of the SOFTWARE PRODUCTS subject to this  22 Agreement in confidence for AT&amp;T."  23 A. Yes.  24 Q. Do you see that?  25 And I believe your testimony was that -- well,</p>	<p style="text-align: right;">Page 191</p> <p>1 System V source code are disclosable at the discretion  2 of Sequent.  3 MR. KAO: Q. And looking now at the next  4 sentence, which includes the language "methods or  5 concepts utilized therein," did you understand this  6 Section 7.06(a) to require Sequent to hold in confidence  7 methods and concepts contained in Dynix/ptx?  8 MR. HEISE: Objection.  9 You may answer.  10 THE WITNESS: It would be a similar response.  11 That is, if there were some patented method within the  12 System V source code, that would certainly be required  13 to be held in confidence. If it was an invention of  14 Sequent alone, then it was, again, Sequent's discretion.  15 MR. KAO: Q. Now, if you can turn with me to  16 Section 2.01, which I believe you also reviewed with  17 Mr. Heise, I believe you testified that as you  18 understood the meaning of the word "treated," that that  19 was distinguishing between ownership on the one hand and  20 treatment of something as confidential on the other. Is  21 that --  22 MR. HEISE: Objection.  23 MR. KAO: Q. -- correct?  24 MR. HEISE: You may answer.  25 THE WITNESS: That's accurate.</p>
<p style="text-align: right;">Page 190</p> <p>1 strike that.  2 Let me ask it this way: Is it your  3 understanding of this provision in the software  4 agreement that Sequent was to hold all parts of the Unix  5 System V source code in confidence for AT&amp;T?  6 A. Yes.  7 MR. HEISE: Objection.  8 You may answer.  9 THE WITNESS: Yes, that's my understanding.  10 MR. KAO: Q. Is it your understanding from  11 this agreement that licensee, meaning Sequent, has to  12 hold all parts of the Dynix/ptx software in confidence  13 for AT&amp;T?  14 MR. HEISE: Objection.  15 You may answer.  16 THE WITNESS: No, that's not my understanding.  17 MR. KAO: Q. What is your understanding of  18 what Sequent has to hold in confidence for AT&amp;T with  19 respect to Dynix/ptx?  20 MR. HEISE: Same objection.  21 You may answer.  22 THE WITNESS: Those modules or components  23 which are wholly or in part comprised of the System V  24 source code would have to be held in confidence. Those  25 modules or components that are independent of Unix</p>	<p style="text-align: right;">Page 192</p> <p>1 MR. KAO: Q. Okay. Now, with respect to code  2 that Sequent developed on its own for Dynix/ptx, was it  3 your understanding that this Section 2.01 required  4 Sequent to treat that code as confidential?  5 MR. HEISE: Objection.  6 You may answer.  7 THE WITNESS: Please repeat the question.  8 MR. KAO: Can you just read it back.  9 (Record read.)  10 THE WITNESS: My understanding is that if the  11 code were purely a Sequent development, that that would  12 not be subject to the provisions of this license  13 agreement.  14 MR. KAO: Q. In testimony that you gave when  15 speaking with Mr. Heise, you recognized the distinction  16 between ownership and control. Do you remember that?  17 A. Yes, I do.  18 Q. Do you believe that -- well, let me ask it in  19 two parts. First, do you believe that Sequent owned the  20 source code that it developed for Dynix/ptx?  21 MR. HEISE: Objection.  22 You may answer.  23 THE WITNESS: I believe that Sequent owned, in  24 its entirety, the source code for Dynix. I believe that  25 Sequent owned those portions of Dynix/ptx which were not</p>



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1 contributed by others, including AT&T.  
 2 MR. KAO: Q. Do you believe that Sequent  
 3 controlled and had the right to control the source code  
 4 for Dynix/ptx that it developed on its own?  
 5 MR. HEISE: Objection.  
 6 You may answer.  
 7 THE WITNESS: Yes, I believe that subject to  
 8 limitations that were applied by the licensed  
 9 third-party components, that Sequent controlled those  
 10 portions, again, in the entirety for those portions  
 11 which were uniquely Sequent's and jointly for those  
 12 portions which third parties were involved.  
 13 MR. KAO: Q. Now, do you recall earlier  
 14 discussing with Mr. Heise how one would go about  
 15 determining whether there is Unix System V code in  
 16 Dynix?  
 17 A. Yes.  
 18 Q. If I wanted to know with res- -- well, let me  
 19 give you some background here.  
 20 Do you understand that, at least as it's -- at  
 21 least as the plaintiff SCO alleges, IBM has contributed  
 22 code from Dynix/ptx to Linux?  
 23 MR. HEISE: Objection.  
 24 You may answer.  
 25 MR. KAO: Q. Do you have an understanding of

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1 that or not?  
 2 A. I do, but you were my source.  
 3 Q. Oh. Well, if I -- let me --  
 4 I'll put on the record that that was not meant  
 5 to be a waiver of the attorney-client privilege.  
 6 MR. HEISE: Too late.  
 7 MR. KAO: Q. Assume with me that -- assume  
 8 with me that IBM has contributed source code from  
 9 Dynix/ptx to Linux. Whether or not that's true, let's  
 10 assume that's the case for the purposes of my question  
 11 here.  
 12 A. Okay.  
 13 Q. Can you do that?  
 14 A. I can do that.  
 15 Q. If I wanted to determine whether there was any  
 16 Unix System V code contained in the source code that was  
 17 contributed from Dynix/ptx to Linux, how would I do  
 18 that?  
 19 MR. HEISE: Objection.  
 20 You may answer.  
 21 THE WITNESS: The most reliable mechanism  
 22 would be to do a source-to-source compare and, as I  
 23 previously described, after suspect areas are  
 24 identified, to have a software expert determine whether  
 25 those are chance likenesses or the result of copying.

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1 MR. KAO: Q. Would I need the modification  
 2 histories for Dynix/ptx in order to make that  
 3 determination, whether there was Unix System V code  
 4 contained in the contributions to Linux?  
 5 MR. HEISE: Objection.  
 6 You may answer.  
 7 THE WITNESS: You would not.  
 8 MR. KAO: Q. Now, in your understanding of  
 9 the term "derivative work," does something need to  
 10 contain code from Unix System V in order to be  
 11 considered a derivative work of Unix System V?  
 12 MR. HEISE: I'm sorry to interrupt. Could you  
 13 just repeat the question?  
 14 MR. KAO: Sure. I'm not -- I'm probably not  
 15 asking it in a very clear way.  
 16 MR. HEISE: No. Somebody just distracted me  
 17 for a moment.  
 18 MR. JAMES: Here, I'll shut the door.  
 19 MR. KAO: Q. As you under- -- well, let me  
 20 just ask you this way: How do you understand -- what do  
 21 you understand a derivative work to be?  
 22 A. A derivative work is something which contains  
 23 a part or all of some other preexisting work.  
 24 Q. Okay. So what would you consider to be a  
 25 derivative work of Unix System V?

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1 A. I would consider a source module or a document  
 2 which contained some substantial portion, meaning not a  
 3 comment line consisting of a semicolon, some substantial  
 4 portion of Unix System V.  
 5 Q. Would I need the modification history of  
 6 Dynix/ptx in order to determine whether Dynix/ptx  
 7 contains source code from Unix System V?  
 8 MR. HEISE: Objection.  
 9 You may answer.  
 10 THE WITNESS: You wouldn't.  
 11 MR. KAO: Q. I could just do a comparison  
 12 between the Unix System V source code and the Dynix  
 13 source code; correct?  
 14 A. Yes.  
 15 MR. HEISE: Objection.  
 16 You may answer.  
 17 THE WITNESS: And then, after that, an  
 18 inspection.  
 19 MR. KAO: Q. Now, as you understand the term  
 20 "modification," does something need to have Unix  
 21 System V code in it to be considered a modification of  
 22 Unix System V code?  
 23 MR. HEISE: Objection.  
 24 You may answer.  
 25 THE WITNESS: I think it's the same. That is,

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1 if the Unix System V code is substantively unchanged --  
 2 we used the example of changing a -- removing a dollar  
 3 sign -- then, yes, I would consider that.  
 4 MR. KAO: Q. And I could determine whether  
 5 something, then, was a modification of Unix System V  
 6 code without having access to the revision histories?  
 7 MR. HEISE: Objection.  
 8 You may answer.  
 9 THE WITNESS: Yes, you could.  
 10 MR. KAO: Q. I could do that by comparing the  
 11 Unix System V code to the modified Unix System V code?  
 12 A. Yes, you could.  
 13 MR. HEISE: Objection.  
 14 MR. KAO: Q. What information would the  
 15 revision -- I think you called it -- maybe I should ask  
 16 you. What did you call Sequent's revision history  
 17 information?  
 18 A. The RCS logs.  
 19 Q. What information would the RCS logs give me  
 20 that having all the source code to Dynix/ptx would not  
 21 give me?  
 22 A. It would give you the programmer's intent for  
 23 the change.  
 24 Q. If you had the source code itself, could you  
 25 determine whether something was based on Unix System V

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1 without having the programmer's notes?  
 2 MR. HEISE: Objection.  
 3 You may answer.  
 4 THE WITNESS: With some high probability, yes.  
 5 MR. KAO: Q. When you talk about Dynix/ptx  
 6 source code, what are you referring to? What universe  
 7 of source code is considered Dynix/ptx source code?  
 8 A. You need to give me a time bound for this.  
 9 Q. Sure, okay. We've been talking in this  
 10 deposition just generally about Dynix/ptx source code.  
 11 And all I'm trying to understand is: If you were asked  
 12 by -- if you were asked by a customer or anybody else to  
 13 provide them with the Dynix/ptx source code, what would  
 14 you provide them with? I guess let's say at the time  
 15 that you were at Sequent.  
 16 A. Okay. Generally, when someone wants access to  
 17 the source code, they want access to the kernel, to the  
 18 libraries, to the utilities, to the on-line and off-line  
 19 documents, and to the makefile.  
 20 Q. That's what you would consider to be  
 21 Dynix/ptx?  
 22 A. Right.  
 23 Q. Now, do the RCS logs that you discuss include  
 24 code that never made its way into a release of  
 25 Dynix/ptx?

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1 A. Lots.  
 2 Q. Would you consider that code to be part of  
 3 Dynix/ptx?  
 4 A. No.  
 5 Q. What is a release of Dynix/ptx? Can you  
 6 explain that for the record?  
 7 A. Certainly. A software release is the  
 8 completed, tested, documented, and authorized for  
 9 distribution version of a particular piece of software.  
 10 So the release viewed from inside the organization would  
 11 include the source, would include the tools, would  
 12 include the build files. A release as viewed from  
 13 outside the organization would be the binary code, the  
 14 release notes, the documentation.  
 15 Q. And releases are assigned different numbers to  
 16 identify them?  
 17 A. Yes. A release will typically have a major  
 18 and a minor version number. Sometimes more precision  
 19 than that if there's a lot of either customer-specific  
 20 or other variation.  
 21 Q. If I wanted to determine if any code in a  
 22 release of Dynix/ptx is based on any code in Unix  
 23 System V, would I need to have the RCS logs?  
 24 MR. HEISE: Objection.  
 25 You may answer.

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1 THE WITNESS: No. The straightforward method  
 2 would be to DIF the files module by module.  
 3 MR. KAO: Q. When you say "DIF the files,"  
 4 what do you mean?  
 5 A. A utility that would do a line-by-line  
 6 comparison of the source code and identify where lines  
 7 were either added or subtracted or changed.  
 8 Q. In order to determine whether a particular  
 9 release of Dynix/ptx contained code implementing any  
 10 methods or concepts of Unix System V, would I need the  
 11 RCS log?  
 12 MR. HEISE: Objection.  
 13 You may answer.  
 14 THE WITNESS: You might, only with regard to  
 15 programmer intent.  
 16 A more likely place to find it would be in the  
 17 release notes.  
 18 MR. KAO: Q. And release notes are -- well,  
 19 strike that.  
 20 Are release notes provided with -- to  
 21 customers?  
 22 A. Yes, they are. They're part of the  
 23 distribution.  
 24 MR. KAO: That's all I have for you.  
 25 MR. HEISE: Just a few follow-up questions.

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<p style="text-align: right;">Page 201</p> <p>1 THE WITNESS: Sure.</p> <p>2 FURTHER EXAMINATION BY MR. HEISE</p> <p>3 MR. HEISE: Q. Before entering into the</p> <p>4 agreement on behalf of Sequent, you've indicated that</p> <p>5 you carefully reviewed it and discussed it with Sequent</p> <p>6 personnel and were involved in some phone conversations</p> <p>7 with AT&amp;T personnel. Is that correct?</p> <p>8 A. That is correct.</p> <p>9 Q. In all of the time that you carefully reviewed</p> <p>10 this agreement, did you note paragraph 4 on page 1 of</p> <p>11 the agreement? And just so that the record's clear, in</p> <p>12 paragraph 4 it states that:</p> <p>13 "This Agreement and its Supplements set forth</p> <p>14 the entire agreement and understanding</p> <p>15 between the parties as to the subject matter</p> <p>16 hereof and merge all prior discussions</p> <p>17 between them, and neither of the parties</p> <p>18 shall be bound by any conditions,</p> <p>19 definitions, warranties, understandings or</p> <p>20 representations with respect to such subject</p> <p>21 matter other than as expressly provided</p> <p>22 herein or as duly set forth on or subsequent</p> <p>23 to the date of acceptance hereof in writing</p> <p>24 and signed by a proper and duly authorized</p> <p>25 representative of the party to be bound</p>	<p style="text-align: right;">Page 203</p> <p>1 from Unix System V?</p> <p>2 MR. KAO: Objection to form.</p> <p>3 THE WITNESS: No, it was not.</p> <p>4 MR. HEISE: Q. What was the core or the basis</p> <p>5 of the Dynix/ptx operating system?</p> <p>6 MR. KAO: Objection to form.</p> <p>7 THE WITNESS: The core was a combination of</p> <p>8 the Berkeley Standard Distribution 4.2 version and code</p> <p>9 created by Sequent.</p> <p>10 MR. HEISE: Q. And are you suggesting that</p> <p>11 the only code that came from Unix System V in Dynix/ptx</p> <p>12 were the utilities?</p> <p>13 MR. KAO: Objection to form.</p> <p>14 THE WITNESS: I can't state that as an</p> <p>15 absolute. Certainly, the preponderance of the code in</p> <p>16 Dynix/ptx predates the licensing of AT&amp;T System V.</p> <p>17 MR. HEISE: Q. But in terms of after the Unix</p> <p>18 System V license was entered into, are you suggesting</p> <p>19 that the only source code that was used from Unix</p> <p>20 System V were the utilities as they appear in Unix</p> <p>21 System V?</p> <p>22 MR. KAO: Objection to form.</p> <p>23 THE WITNESS: No. There would have been a few</p> <p>24 system services that would have been in the kernel.</p> <p>25 MR. HEISE: Q. In reviewing Section 2.01, in</p>
<p style="text-align: right;">Page 202</p> <p>1 thereby."</p> <p>2 Did you carefully review that clause as well?</p> <p>3 A. I did.</p> <p>4 Q. And you understood that that meant all of the</p> <p>5 terms of the agreement were set forth in the agreement</p> <p>6 alone; right?</p> <p>7 A. Yes.</p> <p>8 Q. When we were talking earlier about keeping the</p> <p>9 Dynix code confidential, you stated, both in your</p> <p>10 declaration and here, that you did not want to be</p> <p>11 bargaining away the rights to Sequent's IP. Do you</p> <p>12 recall that?</p> <p>13 A. Yes, I do.</p> <p>14 Q. AT&amp;T telling Sequent to keep Dynix</p> <p>15 confidential when Sequent was keeping Dynix confidential</p> <p>16 was not a bargaining away of any of Sequent's IP rights,</p> <p>17 was it?</p> <p>18 MR. KAO: Objection to form.</p> <p>19 THE WITNESS: No.</p> <p>20 MR. HEISE: Q. When we talk about Dynix/ptx,</p> <p>21 just so we're clear, that arose after the Unix System V</p> <p>22 license was entered into that we've been discussing all</p> <p>23 day today; right?</p> <p>24 A. That is correct.</p> <p>25 Q. And the -- the kernel of Dynix/ptx, was that</p>	<p style="text-align: right;">Page 204</p> <p>1 particular the phrase -- or sentence:</p> <p>2 "Such right to use includes the right to</p> <p>3 modify such SOFTWARE PRODUCT and to prepare</p> <p>4 derivative works based on such SOFTWARE</p> <p>5 PRODUCT, provided the resulting materials are</p> <p>6 treated hereunder as part of the original</p> <p>7 SOFTWARE PRODUCT."</p> <p>8 Do you see where I'm reading from?</p> <p>9 A. Yes, I do.</p> <p>10 Q. If the phrase "resulting materials" is</p> <p>11 determined to mean the modifications or derivative works</p> <p>12 of Unix System V -- and for our purposes, consider that</p> <p>13 Dynix/ptx -- would you agree that Dynix/ptx would have</p> <p>14 to be maintained in confidence?</p> <p>15 MR. KAO: Objection to form.</p> <p>16 THE WITNESS: If the -- you're posing a</p> <p>17 hypothetical, that is, "resulting materials" is an -- is</p> <p>18 determined to mean any source code. Is that accurate?</p> <p>19 MR. HEISE: Q. I'm asking you if the phrase</p> <p>20 "resulting materials" is determined to include Dynix/ptx</p> <p>21 as a modification or derivative work based on Unix</p> <p>22 System V, would you agree that in that case, Dynix/ptx</p> <p>23 would be required to be maintained in confidence and</p> <p>24 could not be publicly displayed?</p> <p>25 MR. KAO: Objection to form.</p>

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1 THE WITNESS: If, hypothetically, the  
 2 resulting materials was inclusive of all of the  
 3 Dynix/ptx source code, then yes, I would agree it would  
 4 have to be maintained in confidence.  
 5 MR. HEISE: Q. With respect to the RCS log --  
 6 the Revision Control System, I guess it stands for.  
 7 A. Yes.  
 8 Q. You were asked a series of questions as to  
 9 whether it would be helpful to have that -- or excuse  
 10 me -- whether it would be needed or necessary to have  
 11 that. Would you agree that it would be helpful to have  
 12 the RCS to be able to track the history of the code as  
 13 it appears in Dynix/ptx?  
 14 MR. KAO: Objection to form.  
 15 THE WITNESS: It would actually both be  
 16 helpful and confusing, because the progression of a  
 17 piece of software from one release to the next is a  
 18 series of additions and subtractions, and so you'd have  
 19 to know what you were looking at.  
 20 The real help in the RCS logs is the statement  
 21 of programmer intent, like "I'm adding a new module" as  
 22 opposed to "I'm modifying such-and-such to fix a bug" or  
 23 something like that.  
 24 MR. HEISE: Q. Well, if in determining where  
 25 Unix System V either source code or methods and concepts

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1 appear in Dynix, would you agree that it would be  
 2 necessary to have every version of Dynix/ptx from the  
 3 beginning until present as opposed to just the last few  
 4 versions?  
 5 A. Not --  
 6 MR. KAO: Objection --  
 7 MR. HEISE: -- of Dynix/ptx.  
 8 MR. KAO: Objection to form.  
 9 THE WITNESS: Actually, it would be simpler to  
 10 start with the last version and DIF it against the first  
 11 version. The middle versions -- and let me elaborate by  
 12 saying, the progression of Dynix/ptx toward the NUMA-Q,  
 13 N-U-M-A-Q, architecture probably resulted in the  
 14 subtraction of more and more System V code because it  
 15 was inappropriate.  
 16 So it would actually be confusing to go to the  
 17 middle releases. Starting with the beginning and the  
 18 end would be better.  
 19 MR. HEISE: Q. So at a bare minimum, to  
 20 undertake a complete analysis, you would need the first  
 21 copy and the last copy?  
 22 A. That would be the ideal.  
 23 MR. KAO: Objection to form.  
 24 MR. HEISE: Q. Would you agree it would be  
 25 impossible, in the absence of having the first copy of

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1 Dynix/ptx, to be able to see what Unix System V was  
 2 throughout Dynix/ptx from the beginning to the end?  
 3 MR. KAO: Objection to form.  
 4 THE WITNESS: Impossible, I don't think I'd go  
 5 for.  
 6 MR. HEISE: Q. What would you go for?  
 7 Extremely difficult?  
 8 A. It just makes it a little harder to figure  
 9 out, yeah.  
 10 Q. But if you were given the task, what you would  
 11 require to do it would be the first copy and the last  
 12 copy of Dynix/ptx --  
 13 MR. KAO: Objection to form.  
 14 MR. HEISE: Q. -- is that correct?  
 15 A. Actually, the first copy I was referring to in  
 16 that statement was the copy of the System V.2  
 17 distribution as delivered by AT&T pursuant to this  
 18 agreement.  
 19 Q. Okay.  
 20 A. And the last copy would be whatever version of  
 21 Dynix/ptx is the now current Dynix/ptx.  
 22 Q. Well, if -- using a statement you made  
 23 earlier, where there was addition and subtraction of  
 24 code, how would one be able to determine what System V  
 25 code was in Dynix without access to all of the versions

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1 if over time some code is put in, some code is taken  
 2 out?  
 3 MR. KAO: Objection.  
 4 MR. HEISE: Q. If you're only looking at the  
 5 last version of Dynix/ptx.  
 6 A. I don't think I'm tracking the question.  
 7 Q. Okay. Let me try and break it into a couple  
 8 bits then.  
 9 A. Okay.  
 10 Q. If one is to look at Dynix/ptx to locate  
 11 System V code, to locate System V methods and concepts,  
 12 et cetera, you've indicated you need to have the  
 13 System V release that was given to Dynix and you would  
 14 also want the last version of Dynix/ptx.  
 15 A. Correct.  
 16 Q. Would you also agree that to determine, over  
 17 time, what System V code was included in Dynix/ptx, you  
 18 would need to see the prior versions from the beginning  
 19 of Dynix/ptx until the last version of Dynix/ptx?  
 20 MR. KAO: Objection to form.  
 21 THE WITNESS: If your question is would I --  
 22 if I wanted to know at any instant in time --  
 23 MR. HEISE: Q. Exactly.  
 24 A. -- what System V code was in or out?  
 25 Yeah, I would need whatever -- the code



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1 snapshot at that instant in time. I'm having a hard  
2 time tracking the question because I'm not -- the only  
3 ones that count are the ones that were released.

4 Q. That's really what the judge is going to  
5 decide. So I'm just trying to get from you a clear  
6 understanding of if -- just making up numbers -- if  
7 there were ten releases of Dynix/ptx, if there was  
8 System V code that was in Release No. 4 but it doesn't  
9 appear subsequently in Release No. 10, the last one --

10 A. Mm-hmm.

11 Q. -- I would have no way of knowing that unless  
12 I had access to Release No. 4; right?

13 A. That's so, if you needed to know that --

14 Q. Right.

15 A. -- particular fact.

16 Let me elaborate by saying, let's suppose --  
17 this is a hypothetical, but let's suppose that the  
18 developer wants to introduce a System V module to  
19 Dynix/ptx, and they just want to run an experiment:  
20 Does this thing bind? Are there any missing symbols?  
21 So they might put the code in, compile it. It throws  
22 out a million compiler errors, all these missing  
23 symbols. And then they figure out how they're going to  
24 deal with that set of missing symbols.

25 So that's why I'm questioning the utility of

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1 looking at the interim versions. It's an experiment,  
2 not necessarily a result.

3 Q. I understand. But it's an experiment that  
4 makes use of Unix System V?

5 A. Sure.

6 Q. Okay. And I would have no way of knowing what  
7 use of Unix System V occurred unless I had access to the  
8 RCS, in your example?

9 MR. KAO: Objection to form.

10 THE WITNESS: Well, the RCS would give you the  
11 programmer's intent, but not necessarily what was --

12 MR. HEISE: Q. I'd need to see the code --  
13 I'm sorry. We broke the rule.

14 I would need to see the code, not necessarily  
15 the RCS, in the example we were just discussing?

16 A. Yes, you would need to see the code.

17 MR. HEISE: If you give me just 30 seconds to  
18 review my notes, we might be done.

19 As I said before, subject to our reservations,  
20 I again thank you for your time today.

21 THE WITNESS: Thank you.

22 MR. KAO: I just have two quick questions.

23 MR. HEISE: Uh-oh.

24 FURTHER EXAMINATION BY MR. KAO

25 MR. KAO: Q. One, Mr. Heise was just asking

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1 you a series of questions where he was referring to  
2 versions of Dynix/ptx.

3 A. Yes.

4 Q. Did you understand him to be referring to  
5 releases of Dynix/ptx? Do you make a distinction in  
6 your mind between versions and releases?

7 A. Actually, that was the source of my confusion.  
8 In my opinion, the things that are relevant to inclusion  
9 or noninclusion of source code are the releases, and  
10 they're -- as development proceeds, there are many, many  
11 versions.

12 Q. What's the difference, in your mind, between a  
13 version and a release, just so I understand?

14 A. A collection of source gets compiled one day  
15 and it might run; it might not run. It's just a point  
16 in time. And the essence of Mr. Heise's questions were:  
17 How would I determine over all time, essentially, what  
18 was the inclusion or noninclusion? And I was trying to  
19 figure out why that was an important thing to know.

20 Q. I understand. But in responding to -- in  
21 responding to Mr. Heise's questions, I was just trying  
22 to understand what it was that you were -- you had in  
23 your mind. Were you -- were you -- were you responding  
24 as to versions or as to releases?

25 MR. HEISE: Objection.

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1 You may answer.

2 THE WITNESS: My response was both to versions  
3 and releases because of the confusion about whether for  
4 any moment in time, you want to know what was included  
5 or whether at specific release points, when someone  
6 outside of Sequent might have had access, you would know  
7 what was included. So I was responding to both terms.

8 MR. KAO: Q. Okay. Is it the case that as  
9 far as Sequent was concerned, the code that was  
10 contained in a release is what is considered Dynix/ptx?

11 A. That's accurate.

12 Q. The only other question I have is back now to  
13 Section 2.01. Mr. Heise asked you some questions, and I  
14 just wanted to make sure I understood what you were  
15 saying. Looking at the last sentence, which says:

16 "Such right to use includes the right to  
17 modify such SOFTWARE PRODUCT and to prepare  
18 derivative works based on such SOFTWARE  
19 PRODUCT, provided the resulting materials are  
20 treated hereunder as part of the original  
21 SOFTWARE PRODUCT."

22 And I believe Mr. Heise asked you to assume  
23 that the words "resulting materials" are to be defined  
24 to include Dynix/ptx.

25 A. In its entirety.

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<p style="text-align: right;">Page 213</p> <p>1 Q. In its entirety.</p> <p>2 Now, if that's the case, then it was your</p> <p>3 testimony that Dynix/ptx, in its entirety, has to be</p> <p>4 treated confidentially; correct?</p> <p>5 A. That's correct.</p> <p>6 Q. Now, if you were to take out pieces of the</p> <p>7 code from Dynix/ptx that Sequent developed on its own,</p> <p>8 would Sequent still have an obligation, in your</p> <p>9 understanding of this language, to treat those materials</p> <p>10 as confidential, even assuming that the whole has to be</p> <p>11 treated confidential?</p> <p>12 MR. HEISE: Objection.</p> <p>13 You may answer.</p> <p>14 THE WITNESS: In my opinion, no. That is, if</p> <p>15 I create something independent of what ultimately</p> <p>16 becomes a derivative work, that's a separately treatable</p> <p>17 and disclosable, in this case, item when it becomes a</p> <p>18 part of the derivative work. The entirety of the</p> <p>19 derivative work is the thing that's bound by the</p> <p>20 confidentiality.</p> <p>21 MR. KAO: Q. Under the assumption that</p> <p>22 Mr. Heise --</p> <p>23 A. Under the assumption that it was so</p> <p>24 determined.</p> <p>25 Q. So even under that assumption, Sequent would</p>	<p style="text-align: right;">Page 215</p> <p>1 MR. KAO: I don't have any follow-up.</p> <p>2 THE VIDEOGRAPHER: Here marks --</p> <p>3 MR. KAO: Just one more question.</p> <p>4 THE VIDEOGRAPHER: Here marks the end of Tape</p> <p>5 No. 3 in the deposition of David Rodgers.</p> <p>6 The original videotapes will be retained by</p> <p>7 LegalLink New York at 420 Lexington Ave., Nos. 2108 and</p> <p>8 2112, New York, New York.</p> <p>9 Going off the record. The time is 3:04.</p> <p>10 (Whereupon, the deposition was adjourned at</p> <p>11 3:04 p.m.)</p> <p>12 --oOo--</p> <p>13 I declare under penalty of perjury the</p> <p>14 foregoing is true and correct. Subscribed at</p> <p>15 _____, California, this ____ day of</p> <p>16 _____, 2004.</p> <p>17 _____</p> <p>18 David P. Rodgers</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 214</p> <p>1 still have the right to pull materials out of Dynix/ptx</p> <p>2 and disclose those materials as it chose to?</p> <p>3 MR. HEISE: Objection.</p> <p>4 You may answer.</p> <p>5 THE WITNESS: That would be my opinion.</p> <p>6 MR. KAO: That's all I have.</p> <p>7 MR. HEISE: A couple of quick follow-ups and</p> <p>8 we will hopefully be done.</p> <p>9 FURTHER EXAMINATION BY MR. HEISE</p> <p>10 MR. HEISE: Q. When we were talking earlier</p> <p>11 about seeing what System V code appeared in Dynix/ptx at</p> <p>12 any moment in time, that is when we would need to have</p> <p>13 access to all the versions as opposed to the final</p> <p>14 releases. Is that a correct statement?</p> <p>15 A. Yeah. If it were important to know on any</p> <p>16 given day, yes.</p> <p>17 Q. Do you know whether the contributions of</p> <p>18 Dynix/ptx that went to Linux came from Dynix/ptx as the</p> <p>19 whole or if they came from the separate place where they</p> <p>20 were independently developed and incorporated into</p> <p>21 Dynix/ptx?</p> <p>22 MR. KAO: Objection to form.</p> <p>23 THE WITNESS: I don't know.</p> <p>24 MR. HEISE: Again, subject to the</p> <p>25 reservations, I thank you for your time today.</p>	<p style="text-align: right;">Page 216</p> <p>1 CERTIFICATE OF REPORTER</p> <p>2 I, ANA M. DUB, a Certified Shorthand Reporter,</p> <p>3 Registered Merit Reporter, and Certified Realtime</p> <p>4 Reporter, hereby certify that the witness in the</p> <p>5 foregoing deposition was by me duly sworn to tell the</p> <p>6 truth, the whole truth, and nothing but the truth in the</p> <p>7 within-entitled cause;</p> <p>8 That said deposition was taken down in</p> <p>9 shorthand by me, a disinterested person, at the time and</p> <p>10 place therein stated, and that the testimony of the said</p> <p>11 witness was thereafter reduced to typewriting, by</p> <p>12 computer, under my direction and supervision;</p> <p>13 That before completion of the deposition,</p> <p>14 review of the transcript [ ] was [X] was not requested.</p> <p>15 If requested, any changes made by the deponent (and</p> <p>16 provided to the reporter) during the period allowed are</p> <p>17 appended hereto.</p> <p>18 I further certify that I am not of counsel or</p> <p>19 attorney for either or any of the parties to the said</p> <p>20 deposition, nor in any way interested in the event of</p> <p>21 this cause, and that I am not related to any of the</p> <p>22 parties thereto.</p> <p>23 DATED: June 14, 2004.</p> <p>24 _____</p> <p>25 ANA M. DUB, RMR, CRR, CSR No. 7445</p>